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BENEFICIAL TRUSTS IN MARRIAGE AND OTHER SETTLEMENTS.

AS AFFECTED BY THE LAW REFORM (MARRIED WOMEN AND
TORTFEASORS) ACT, 1935.

“*The Law Reform Act, 1935.*”

(1) A perfectly vast alteration in regard to the law as to married women and their property has been effected recently by Part I of the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30). The Act expressly does not apply *section 8 (2)* to Scotland or Northern Ireland, and of course it does not apply to the Irish Free State. Accordingly the writer conceives that a settlement or will of his personalty by a domiciled Scot or Northern Irish person, or a Free State domiciled person, is outside the provisions of the Act (see *Dulaney v. Merry*, [1901] 1 K. B. at p. 544), at all events if there is nothing to show that the settlement or will is to be construed according to English law.

(2) The effect of *section 1* is, shortly speaking and generally with the special particular savings in *section 4 (a) (b) and (c)*, to put a married woman into the position in all respects of a *feme sole* as regards capacity of acquiring holding and disposing of any property, rendering herself and being rendered liable in respect of any tort contract debt or obligation, enabling and subjecting her to sue or be sued in tort contract or otherwise, and subjecting her to the law of bankruptcy and to the enforcement of judgments and orders.

“Effect in general.”

The effect of *section 2 (1)* is shortly speaking and generally to make all property which immediately before August 2, 1935, was the separate property, at law by virtue of the M. W. P. Acts, of a married woman, or held for her separate use in equity, or which belonged at the time of her marriage to a woman married after that date, or after that date is acquired by or devolves on a married woman, to belong to her in all respects as if she were a *feme sole*, and to be disposable of by her accordingly. There is a proviso to this subsection preserving the validity of a restriction on anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such restriction contained in any Act passed before August 2, 1935, or in any instrument *executed* before January 1, 1936. But to this there is a counter-exception—namely, that in the case of a testator dying after December 31, 1945, notwithstanding the actual date of execution of his will, his will for this purpose is deemed to have been executed after January 1, 1936: *section 2 (3) (c)*.

On the other hand an instrument attaching such a restriction executed after January 1, 1936, in pursuance of an obligation imposed before that date to attach such a restriction is deemed to have been executed before January 1, 1936: *section 2 (3) (a)*. The case of a settlement made after marriage pursuant to antenuptial agreement for settlement before that date imposing such obligation is thus saved. An exercise of a special power of appointment for purpose of date ranks as of the date of exercise, not creation of that power: *section 2 (3) (b)*.

“Restraint on anticipation in general invalidated.”

(3) Subject as above stated in *para. 2*, the Act (*section 2 (2)*) enacts “any instrument executed on or after the 1st January, 1936, shall, in so far as it purports to attach to the enjoyment of any property by a woman any restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man, be void”.

(4) Part I of the Act (which includes the first five sections) does not during any coverture which began before January 1, 1883, affect any property to which the title (whether vested or contingent and whether in possession reversion or remainder) of a married woman accrued before that date except property held for her separate use in equity: *section 4 (1) (a)*. In this way the old common law rights of husband and wife are in such case preserved when the property of a woman married before January 1, 1883, was not held to her separate use; but when it was so held the old

equitable separate use for her will apparently be converted into a trust for her as if she were a *feme sole*, not as if she were a wife with separate property in equity.

“The expression ‘separate use’ should still be applied to a wife’s interest.”

(5) Notwithstanding that the Act eliminates the word “separate” throughout the M. W. P. Act, the present writer thinks that the expression “separate use” should still be applied in settlements and wills to the wife’s interests. Of course, though a woman settles her estate on herself for life only in contemplation of her marriage, that life estate is a new estate acquired on her marriage: see *Re Ashby*, [1892] 1 Q. B., at p. 376. There is nothing whatever in the Act to prevent the old meaning being given to such an expression, and in some cases this retention may be of importance, and it cannot do harm.

“‘Separate use’ involves power in equity of appointment by deed or will—compendiously expressed.”

(6) When equity had succeeded in establishing its principles as to the validity in equity of property being given for the separate use of a married woman, it was held not only that such property was in equity her own apart from her husband’s interference whilst he lived, but also, though for some time there was cavil on the point, that the expression of “separate use” gave her power by her will to appoint how after her death the trustees, or in default of express trustees her husband, were to hold and deal with that property whether personal or real: *Fettiplace v. Georges*, 1 Ves. jr. 45; 3 B. C. C. 7; *Taylor v. Meads*, 4 De G. J. & S. 597. In other words the lady had an equitable power of appointment by deed or will, compendiously included under the expression “for her separate use”, equivalent to an express power written out at large: *Re Mackenzie*, [1911] 1 Ch., at pp. 597, 598; *Taylor v. Meads*, 4 De G. J. & S., at p. 604; *Cooper v. Macdonald*, 7 Ch. D., at p. 293; *Re Hernando*, 27 Ch. D., at p. 296; Sugden, Powers 115.

In this way equity reverted to the old common equitable will of real estate, where before the Statutes of Devise of Henry VIII, there being till then no general power of devise, a man conveyed the fee to feoffees to the equitable use in fee of himself or the uses appointed by his will. After those statutes a man, but expressly not a married woman, had the statutory powers of legal devise thereby given, but the power by will to appoint the use under express power still remained either to man or wife.

“Power to appoint could always exist in him who had the absolute property in default of appointment.”

A general power of appointment of property could always exist in that person who had the property absolutely in default of exercise of that power: *Farwell* 45, 300; *Chance*, ss. 43 *et seq.*; *Roach v. Wadham*, 6 East 239; *Att.-Gen. v. Selborne*, [1902] 1 K. B. 388. A married woman could equally have an expressly written out power of appointing by will, and in default of exercise of that express written power, “the separate use” in that property: *Re Hernando*, 27 Ch. D. 284, 296; *Re Mégret*, [1901] 1 Ch. 547; *Taylor v. Meads*, 4 De G. J. & S. 597, at p. 607, where the word “special” is used not in contrast to “general” but in the sense of “expressed”.

If she did not exercise her express written power, or if for any reason the exercise of her express written power were invalid, still if she devised or bequeathed the property, that operated as an exercise of her equitable power of appointment involved in the mere expression of “separate use” (*Re Hernando*; *Taylor v. Meads*, *supra*), in the same way as if she had had no express written power at all: *Re Mackenzie*, [1911] 1 Ch. 578.

Now the property might be only personal estate, and consequently the law of the domicile at the wife's death might preclude her making a will at all, or giving by will as she thought fit the whole of her absolute property held by her merely as a *feme sole*. But she might validly exercise the express written power (*Re Mégret*, [1901] 1 Ch. 547: see *Re Pryce*, [1911] 2 Ch. 286, 291, 296 (though Buckley, L.J., objected (p. 300) to *Re Mégret*)) or the power involved in the mere expression “separate use”: *Re Hernando*, 27 Ch. D. 284, 296, cf. *Re Mackenzie*, [1911] 1 Ch. 578, where in either case it could be inferred (as it usually could be) that the donor of the power intended English law to apply, by giving the property in question specifically to persons or in a manner which the law of her domicile would prohibit. But if she combined in one undistinguished mass the property so appointed, with her own property not subject to express written power or not expressed as to her “separate use”, then see *Re Pryce*, [1911] 2 Ch. 286 in C. A., and consider whether that decision can stand with *O'Grady v. Wilmot*, [1916] 2 A. C. 231, pp. 248, 262, 263, 272, in which *Re Hadley* was overruled.

“Savings of separate use are also separate use.”

(7) Remembering the above, and also that savings and investments of savings of income or property held to the “separate use” made during coverture but not during discoverture (*Spicer v.*

Spicer, 24 Beav. 365) were also held to the separate use (*Re Mackenzie*, [1911] 1 Ch., p. 598; *Willson v. Pack*, Pre. Ch. 295; *Offley v. Offley*, *ibid.* 26; Gilbert, Ch. 344, 345; Coote, Mortgages 352, 353; see *Fettiplace v. Georges*, 1 Ves. jr. 45; 3 B. C. C. 7) the use of the phrase "separate use" should not it is thought be dropped. Moreover it would seem necessarily to follow that a will made in English form of her personal property settled to "her separate use" of a married woman when separate use according to the law of England can be intended, though not made in compliance with the form required by the law of her domicile at her death for a testamentary act would be perfectly good as a testamentary act as to such property only: see *Murphy v. Deichler*, [1909] A. C. 446; *Re Tréfond*, [1899] P. 247; Mortimer, Probate 33, 34, 391.

"Usual income trusts in a marriage settlement before the 1935 Act."

(8) For long before this Act of 1935 the almost invariable custom had become established, that where no special reason could be adduced to the contrary, each spouse should take the first life interest in the property settled on his or her side (see *Clark v. Girdwood*, 7 Ch. D. 9), and the second life interest in the property settled on the side of the other—the wife in each case being expressed to take for her separate use with a restraint on anticipation.

"Exceptions."

It was, however, not unusual where the husband was engaged in trade, and so more especially open to financial disaster, to give the wife also the first life interest restrained, in the property settled on the husband's side: Dav., Settlements (3rd vol.), p. 69; Elphinstone, Intro. Conv. (7th ed.) 435. Again, the writer has known a case in which the relations who had brought up and knew the young wife, to the surprise and reluctance of the husband and his advisers, insisted, and very wisely as the event turned out, on the husband having the first life interest in by far the largest part of the wife's settled property as well as in his own property.

"The great value in the interest of the whole family of the restraint on anticipation now avoided of the wife's interests."

(9) Owing to section 2 (2) of the Act of 1935 a restraint on anticipation or alienation of the wife's interest expressed in these words, except in the rare case of an ante-nuptial agreement for

settlement made before January 1, 1936, requiring such restriction, being carried into execution after that date (*section 2 (3) (a)*) will be void. But as one of the essential objects of any marriage settlement is and has been for the last 150 years to protect the wife *and incidentally through her the young family* that may be hoped for against her husband's intimidation or cajolery it is thought that notwithstanding the Act the wife should never be given a full life interest in the property settled whether on her or her husband's side, except on special instructions to that effect, arrived at only after she, or her relations acting for her, have been fully apprised of what may be its consequences: and that she should be given only a protected life interest which can still be done in the way hereafter mentioned.

"Reasons to preserve as nearly as may be the old form of marriage settlement."

Indeed, as will presently appear (paras. 11 and 12), where the property settled on each side is approximately equal, there is good reason to give the wife a first protected interest in the funds settled on the husband's side, and the second life interest therein to him, and to give him the first life interest in the funds settled on her side, with the second protected interest to her.

The writer has been concerned in cases in which the restraint on anticipation almost certainly saved the whole family, including young children, from destitution. Whatever the intending wife may dictate as to property settled by her, her father or other relation settling his own property on her should insist on such a protected interest therein; or at least on an overriding advancement clause: see para. 27.

"Why a restraint on anticipation is now void."

(10) A restraint on anticipation or alienation on the wife's interest created after January 1, 1936, is rendered void by section 2 (2) of the Act of 1935 (see para. 3), because it is impossible in English law to give a man an interest, say a life interest, and then notwithstanding his bankruptcy or alienation to say that at the same time that interest shall continue as originally given in him personally, and yet be unaffected by such voluntary or involuntary alienation (*Re Fitzgerald*, [1903] 1 Ch., at p. 940; *Rochford v. Hackman*, 9 Hare, at p. 480; *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Younghusband v. Gisborne*, 1 Coll. 400), nor can this position be got over by phrasing the gift to the trustees as for the personal maintenance of the man only and of no other object of the discretion, and by not *totidem*

verbis giving him a life interest: *Graves v. Dolphin*; *Younghusband v. Gisborne*, *supra*; *Re Coleman*, 39 Ch. D., at p. 452.

“A matter of mere English precedent, not formerly of public policy.”

This position is matter of English precedent, and was not of public policy; accordingly an alimentary provision for the husband made by the wife domiciled at the time of her marriage in Scotland, in her ante-nuptial marriage settlement, which on construction was to be construed according to Scottish law, would be enforced according to that law, though the husband was at the time of the marriage and remained domiciled in England: *Re Fitzgerald*, [1904] 1 Ch. 573, 589, 597.

“One person A can give to another B a life interest in A’s property determinable on B’s bankruptcy.”

(11) But one person, *e.g.*, the intending wife, wife’s relation or the husband’s relation, could always give to another person, *e.g.*, the husband, in the property belonging to the intending wife or the relation a life interest until the husband’s bankruptcy or alienation (*Ex p. Hinton*, 14 Ves. 598; *Brandon v. Robinson*, 18 Ves., pp. 432, 433; *Shee v. Hale*, 13 Ves. 404), or give him in inception of gift a full life interest, with a subsequent condition or a limitation over determining the previously given full life interest on his bankruptcy or alienation (*Lockyer v. Savage*, 2 Strange 947; *Ex p. Eyston*, 7 Ch. D. 145; *Brandon v. Robinson*, 14 Ves., p. 433; *Kearsley v. Woodcock*, 3 Hare 145; *MacIntosh v. Pogose*, [1895] 1 Ch., p. 511; *Re Forder*, [1927] 2 Ch. 291), and even though there were no express gift over on the event: *Rochford v. Hackman*, 9 Hare 475; *Jarman, Wills* 1415; *Elph. Intr. Conv.* (7th ed.), p. 439, note; *Re Cooper*, 86 L. J. Ch. 507.

In case, however, of any determinable interest being given whether to husband or wife, it is advisable to direct how the income is to go for the rest of the life after determination, lest the words used may leave a gap before the trusts of capital declared as arising only after the death of the survivor of the spouses.

This case is provided for by an expressed protective trust: *T. A.*, 1925, s. 33.

As to the validity of a gift in immediate fee by A to B till B goes bankrupt or alienates (*Re Leach*, [1912] 2 Ch. 422), and as to the distinction between a gift in immediate fee to B absolute in inception, but followed by condition against or conditional limitation over on B’s bankruptcy or alienation, see note on

Remoteness, para. 23 (which will later appear in this publication):
Re Forder, [1927] 2 Ch. 291.

“A man cannot settle his own property on himself till he go bankrupt so as to avoid the result of bankruptcy.”

(12) But a settlement by a man of his own property on himself for life until his bankruptcy or the happening of any other specified event is (but only as to the limitation till his bankruptcy: *Re Detmold*, 40 Ch. D., p. 588; *Re Brewer's Settlement*, [1896] 2 Ch., p. 506; *Re Perkins' Settlement*, [1912] W. N. 99; *Brook v. Pearson*, 27 Beav. 181) void against his trustee in bankruptcy: *Higginbotham v. Holme*, 19 Ves. 88. Accordingly, if he goes bankrupt, and his life interest is then subsisting undetermined on the previous happening of any other of the events specified, his full life interest will vest in the trustee in bankruptcy for the benefit of the creditors under that particular bankruptcy regardless of there being a gift over of the income for the rest of his life: *Re Burroughes Fowler*, [1916] 2 Ch. 251. Subject, however, to satisfaction of the creditors under that bankruptcy, that bankruptcy does *per se* operate as against the settlor as a determination of his interest: *Re Johnson*, [1904] 1 K. B. 134.

If indeed another of the specified determining events has happened previous to the bankruptcy becoming operative, then the life estate is already thereby effectively determined *before the bankruptcy and the trustee in bankruptcy takes nothing*: *Re Detmold*, 40 Ch. D. 585; *Re Johnson*, [1904] 1 K. B., at p. 137; *Re Perkins' Settlement*, [1912] W. N. 99; *Brooke v. Pearson*, 27 Beavan 181; *Re Bullock*, 60 L. J. Ch. 341.

Where a son having under parent's post-nuptial appointment a joint power of appointment with his father and subject to his father's life interest a life interest joined with his father in appointing such a determinable life interest to himself, it was held that this was not a settlement of the son's own property within the rule stated in this paragraph: *Re Ashby*, [1892] 2 Q. B. 872.

“Protective life interest can still be given to the wife.”

(13) Nothing in the Law Reform, etc. Act of 1935 prevents a protected life interest being given to the wife. And this can be easily effected by giving the income during her life on protective trusts for her benefit: *T. A.*, 1925, s. 33. This, shortly speaking, gives her a life interest till otherwise she would lose that interest, and on that event brings in a discretionary trust in the trustees of the income for the rest of her life for all or any of herself

her husband and issue for the time living, etc. In a marriage settlement these discretionary trusts imported by statute should however be varied in the way suggested below as can be done: section 33 (2).

“*Defects of the protective trusts defined in Trustee Act, 1925, s. 33.*”

(14) *First*: If T. A., 1925, s. 33, is adopted without any qualification it will be seen that if and while the husband and wife are both living and also have no living issue, *they are the only objects of the discretionary part* of the protective trust. Now the wife whether she trades or not can be made bankrupt: *L. R. A. Act, 1935, s. 1 (d), 2nd Schedule*. If for instance both go bankrupt then the trustees in bankruptcy by combining could insist on the settlement trustees paying over the income during such period and the trustees could not safely pay the income to or apply it for the benefit of either spouse: *Graves v. Dolphin*, 1 Sim. 66; *Young-husband v. Gisborne*, 1 Coll. 400; *Re Colman*, 39 Ch. D., at p. 452; *Re Neuburgher's Settlement*, [1923] 1 Ch. 508; *Re Bullock*, 60 L. J. Ch., p. 343.

But as to so much only (if any) of the particular fund settled on protective trusts for her as belonged at the marriage to the wife, the position stated in para. 12 would apply. It is advisable then at all times to have some object of the discretionary trust in existence in addition to the spouses. This may be effected by varying section 33 (1) (ii), as may be done (sub-section 2), so that the section is read as striking out the word “or” at the end of (a) and the whole of (b) down to and inclusive of the words “as the case may be”, with substitution for the words so struck out of the words following: “and but [unless the trustees see in any case special reason to the contrary] only if as often as and while there is no living issue of the principal beneficiary the persons or person who if the principal beneficiary were then dead without having married and without having left any issue would for the time being and from time to time be the statutory next-of-kin of the principal beneficiary”. Thus there should at all times be another object of the discretion besides the spouses, and accordingly, so long as there is another object, the trustees may maintain, but perhaps barely, the spouses (*Re Colman*, 39 Ch. D. 443 (the decree); *Re Ashby*, [1892] 1 Q. B., at p. 877; and may safely pay the residue, or the whole as they think fit, of the income to or apply it for the outside object as his property: but of course must not pay to him on any secret trust for the spouses. What that object does with his own money is no concern of the trustees.

“*Defects of section 33 continued.*”

(15) *Secondly*: Even if section 33 be allowed to stand unvaried the words of (b) are not very apt to the case of the wife's life interest determining while the wife has no issue of the marriage living having regard to the usual form of the ultimate trusts of the wife's fund till lately in use. It may be difficult consistently with that form to say who in such case would be entitled to the income if she were then dead. See *Re Cooper*, 86 L. J. Ch. 507, where though the husband was living he had not an actual life interest. If her protective trust was in the husband's property, his executors would be the persons for the time being entitled according to the usual form of ultimate trust.

“*Defects of section 33 continued.*”

(16) *Thirdly*: T. A., 1925, s. 33, prevents an advance under an express or statutory power (T. A., 1925, s. 32) from operating to forfeit the life interest. It is law that such consent to an express power would not so operate (*Re Hodgson*, [1913] 1 Ch. 34); but it has apparently been held in a case in which *Re Hodgson* was not cited that the consent to the statutory power of advancement would so operate when the protected life interest was not a protective trust under and so with benefit of the express provision in section 33: *Re Stimpson*, [1931] 2 Ch. 77.

It is advisable having regard to the many powers conferred on trustees and especially when the husband settles a life policy to provide expressly that no act or consent which the wife or the trustees respectively were empowered by the settlement to do or give shall operate as a forfeiture of the life interest.

“*If the settlement is itself made under a special power, the latter must authorise delegation of discretions.*”

(17) It must be remembered that where the settlement is itself made under a *special* power, the discretionary part of the protective trust cannot be inserted, unless the instrument creating such special power so authorises—“*Delegatus non potest delegare*”—see *Re Boulton*, [1928] Ch. 703. For this reason the power when inserted of appointment by the survivor of the spouses of a portion of the settled property on a second marriage, and the powers in other cases of appointing life interests or jointure rent-charges to any spouse who may survive the appointor, should be drawn so as to allow of appointing such discretionary trusts.

Owing to the rule of perpetuity it is practically impossible to give this power of appointing discretionary trusts in the parents’

power of appointment amongst issue of the intended marriage contained in their marriage settlement: see note on *Remoteness* (to appear in this publication), *paras.* 9, 18.

If expressly given it is advisable in the creation of the power to state that such discretionary trusts are to be operative only until twenty-one years from the death of the survivor of the spouses.

“Advisability of some limited power to dispense with forfeiture under the protective trust.”

(18) Where a protective trust is given it is generally advisable to confer a power on the life tenant to release his or her life interests to a limited extent in favour of a child of the marriage who has attained twenty-one or being female has married, making this power of release exercisable only with the trustees' consent. Sometimes a wider power is vested in the trustees of dispensing by anticipation with what would otherwise occasion a forfeiture, and condoning a past forfeiture.

“The ultimate trusts of a marriage settlement as affected by the Act of 1935.”

(19) By invalidating the restraint on anticipation the *Law Reform Act of 1935* considerably affects the ordinary form of the ultimate trusts of the wife's fortune in use up to the date of this Act.

By this form subject to the spouses' life interests and in default of a child of the intended marriage attaining twenty-one or being female marrying, and subject to any appointment made under the powers of appointment in favour of the issue, the wife was given whether while covert or discoverd a general power of appointment by will over her settled fortune, but only while she was discoverd was she given such a general power as to be exercisable by deed. In default of her exercise of her power, but only if she survived the husband, it was given to her, often expressly, for her separate use, but whether or not separate use was expressed with an express restriction on her anticipation of her contingent reversionary interest during coverture; but if she predeceased the husband it was directed to be held on trust for those persons who if she had died possessed thereof intestate and without having been married would have taken as her statutory next-of-kin.

In this way, during her marriage she could only provide for her husband by exercising her power to appoint by will, a necessarily revocable document: and she was preserved from inducement on his part to mortgage or deal with the contingent reversionary

interest which she would take should she in fact survive him, so as to satisfy his creditors.

By the invalidation of the restraint on anticipation she is now exposed to such inducement, if indeed the old form of ultimate trust is still preserved. Moreover the wife by the *Law Reform Act, 1935*, can contract debts absolutely and in all cases as if she were a *feme sole*, which she could not do before this Act: see *M. W. P. Act, 1893, s. 1*, repealed by the Act of 1935. Her husband then may induce her to pledge her credit to support his extravagance. If, then, the former usual power to appoint by deed while discoverd be given in the ultimate trusts, this will enable her to get more credit to support his extravagance than if it were omitted; and since in all cases she can now be made bankrupt, she may as a widow find her trustee in bankruptcy exercising her power to appoint by deed (*Bankruptcy Act, 1914, ss. 38 (b), 55 (4)*) in effect to satisfy her dead husband's extravagance, whereas if she has power to appoint by will only she need not, and the trustee in bankruptcy cannot exercise that power: see *post*, para. 24.

"The ultimate trusts of the wife's property should be altered to giving her power to appoint by will only."

(20) Accordingly the intending wife may herself wish, and her responsible relations would it is conceived certainly wish, that she should be preserved from such inducement. The only satisfactory way to effect this, as it seems to the writer, is in the ultimate trusts of her settled property to give her a general power of appointment exercisable by *will only*, and in default of her exercise of that power, to give it as before the Act it was given, had she in fact predeceased her husband.

"Precautions to be taken on such alteration."

(21) But if the ultimate trust of her fortune is so limited two things must be remembered:—

First: That if there be no child of the then intended marriage who attains a vested interest, she should later in the deed be given special power by deed in contemplation of her second or future marriages to appoint the *whole* of her fortune in settlement on the husband and issue of any her second or future marriage even though if any child of her then intended marriage attains a vested interest it is not intended to give her any power to settle any part of her fortune on a future marriage. Otherwise she would not be able to make an effective settlement *inter vivos* on a second marriage: Davidson, *Settlements*, 3, pp. 183, 184. See *post*, paras. 28 to 30.

Secondly: That before she assents to such limited ultimate trust she, or if she be an unemancipated woman living with and on terms of affection with her father her natural agent and giving instructions (see *Tucker v. Bennett*, 38 Ch. D., pp. 9, 17) then he, completely understands what her rights would be under the ordinary ultimate trust hitherto in use as such clause is affected by the Act of 1935, and what she is giving up by consenting to such limited ultimate trust, and a record of such explanation should be kept: see *Constantinidi v. Ralli*, [1935] 1 Ch. 427.

“A relation settling his own property can as to that dictate the form of ultimate trust, and by so settling can bargain for a limited ultimate trust as to the wife’s own property settled.”

(22) Her father or other relation settling his own property in her marriage settlement can of course dictate the ultimate trusts in his own property so settled. Moreover, as a condition of his settling any property at all of his own, he can of course bargain with her that she shall take a limited ultimate trust even in her own property: see apparent instances in *Tucker v. Bennett*, 38 Ch. D. 1; *Re Crawford’s Settlement*, [1905] 1 Ch. 11. Even though he demanded that in default of her exercise of her power by will to appoint, he himself alone and in any case should take under the ultimate trust; and even though the only property which she settled was property appointed practically simultaneously with her settlement by him to her under a *special* power, this would not necessarily prove any fraud in his exercise of that his special power. To prove fraud in such exercise (and the onus of proof lies on the persons alleging such fraud: *Farwell* 469; *Cochrane v. Cochrane*, [1922] 2 Ch., pp. 246, 247) it is not enough to prove that prior to the appointment there was a bargain by the appointee with the appointor to make a settlement conferring some benefits on non objects of the appointor’s special power; it is necessary to show that *without such bargain the very appointment would never have been made*: *Re Turner’s Settlement*, 28 Ch. D., at pp. 216, 217, 219; *Farwell* 474—476.

If, then, the father makes it clear that he will in any case make the appointment, but if the daughter does not consent to limit the ultimate trust in her own property as he wishes, he will himself settle nothing at all, there can be no question of fraud in the exercise of the power, however much the daughter would prefer not to comply with his wishes. The father’s chance of surviving the daughter and so taking under the ordinary form of ultimate trust, formerly the whole, now if the mother survives a half, has never been considered any indication of a fraud on his power.

And we may further note that a father donee of a special power to appoint to issue could properly purchase the interest appointed to his child, provided that that interest did not exceed in value what the child would take in the fund in default of appointment: see Farwell 462, 463, and compare the proviso to *L. P. A.*, 1925, s. 157 (1).

"Care to be taken on any such bargain."

(23) But the father is the natural person to advise at all events an unemancipated daughter as to the terms of her marriage settlement (*Tucker v. Bennett*, 38 Ch. D., pp. 9, 17); and if he stipulates that he shall take a real benefit under her settlement, e.g., that he himself shall take in any case under the ultimate trusts of her fortune (his chance of surviving her and so taking as her statutory next-of-kin was nothing for this purpose and occurred in *Tucker v. Bennett*, 38 Ch. D. 1), then it is certainly most advisable that the solicitor preparing the settlement should insist on taking instructions on that point direct from the lady herself, or some agent of hers other than the father, and advise her as to her rights accordingly: *Tucker v. Bennett*, 38 Ch. D., p. 9.

"Her exercise by will of her power makes the property appointed assets."

(24) If the ultimate trusts become effective and the wife exercises her general power of appointment by will thereunder, then her settled fortune to the extent of such exercise will become assets, but if she dies solvent only in the last rank of administration, for the payment of her debts (*Law Reform Act*, 1935, s. 1; *A. E. A.*, 1925, ss. 32 (1), 34, *First Schedule, Parts I, II*): following the old equitable doctrine of preferring creditors to volunteers under the appointment when made by a man (*O'Grady v. Willmot*, [1916] 2 A. C. 231; Farwell 286 *et seq.*), and as was the case as to her ante-nuptial debts when the appointment was by a married woman: *Re Parkin*, [1892] 3 Ch., p. 521.

"Her trustee in bankruptcy cannot exercise such power."

But where the wife has general power to appoint by will only, her trustee in bankruptcy cannot exercise the power if she has gone bankrupt, as a married woman may in any case now go (*Law Reform Act*, 1935, s. 1 (d), and *2nd Schedule*: see *Re Guedalla*, [1905] 2 Ch. 331); moreover, as there held (p. 338) the property if appointed by her is available only for her creditors who have become such since the receiving order, and not for the creditors

in her bankruptcy, but this latter point was left open by C. A. in *Re Benzon*, [1914] 2 Ch. 68. Though the power be general to the wife by deed or will to appoint, her trustee in bankruptcy cannot exercise it after her death: *Nichols to Nixey*, 29 Ch. D. 1005.

To prevent the wife inadvertently exercising her general power by a general bequest of her property (*Wills Act*, 1837, s. 27), the writer usually puts in words which make it certain that her power will only be exercised if she really intends to exercise it.

"Improper ultimate trust insisted on; what solicitor should do."

(25) It may perhaps be of use to relate that on one occasion after the writer had settled and sent out the draft marriage settlement of an adult lady, a Roman Catholic, containing the then usual ultimate trusts of her property, her solicitor arrived in agitation saying that the lady and her mother, a widow and also a Roman Catholic, insisted on making the ultimate trust direct for the lady's Father Confessor. The writer insisted on seeing each lady separately in his chambers and explained to each the absolute impropriety of their proposal. Each was politely adamant. He then refused to have anything more to do with the matter unless the lady was given power on a second marriage to settle the whole property if no child of her first marriage attained a vested interest and in any case, as well as he can recollect, a specified portion. This was conceded and done. This was not a case in which he could follow the counsel of perfection given in *Powell v. Powell*, [1900] 1 Ch., at p. 247, and refuse all further assistance. The ladies had his draft before them, were perfectly competent to strike out his words and substitute the name of the Confessor, and would undoubtedly have done so if he had refused further assistance. The name of the Confessor was probably a mere cloak for some Roman charity.

"General advisability of protective trust to avoid marital dispute."

(26) On the whole the intending wife, at all events her responsible relations when she is unemancipated, will be well advised to remember Lord Thurlow's *dictum* "that a wife can always be kicked or kissed by her husband out of her fortune", to doubt whether the wisdom of a Legislature sensitive to the suffrage of a self sufficient spinsterhood can in 1935 radically alter female human nature, and to preserve the same protection to her, and through her to the young children hoped to be the product of the union, and whose interests the Legislature seems wholly to have forgotten, as nearly as can be as she enjoyed under the common form of

marriage settlement before the Act, and in so doing to negative as far as may be causes of friction between the spouses.

Before the Act an improvident husband coming home to his wife said: "My dear, by mortgaging your life interest with a policy on your life, I can raise £——, which will save me from bankruptcy—will you save me?" What could a loving wife reply but "Yes"? They went together to their solicitor, who at once said: "The restraint on anticipation prevents this." They combined to curse the trustees, the law, or both, but not each other. The man went bankrupt as he would equally according to common experience have gone had his wife been able to assist him, but he did not drag down to destitution his wife and family.

The writer has heard some counsel say that as the Legislature invalidates the restraint, it is not right to get round the Act as far as possible. There are those who genuinely believe any decree of a democratic Legislature to be the acme of understanding, and we may recollect that Job replies to his comforters: "No doubt but ye are the people and wisdom will die with you." The present writer would, however, in general consider a counsel so asserting as actuated rather by disinclination to put himself to the trouble of protecting the wife and young family, the main object of a marriage settlement, than by a complete belief in his assertion: and nonetheless that in the report of the eminent gentlemen on which the Act is founded this passage occurs: "It will of course still be open to settlors to settle funds upon married women or others on protective trusts similar to those under which settlements on men are made."

"Mode of giving full life interests with overriding power of advancement to the issue."

(27) To some extent the interests of the young family could be preserved even during the parents' lives, and though in inception the parents are given full life interests. This could be done by giving the trustees an overriding power of advancement in favour of the issue, with power of veto of its exercise during the parents' lives and life by either parent only so long as he or she had not done any act or no event had happened whereby his or her life interests or any part thereof had become vested in, charged in favour of, or payable to any other person.

Where this is done it is advisable that the wife should be given the first life interest in the property settled on the husband's side, the second in her own, and *vice versa*: see para. 11. Suppose this done and the husband to go bankrupt. The trustees with the wife's assent if she be still living can apply the whole of the wife's

fortune in advancement of the issue, while the wife retains for her life the income of the fund settled on the husband's side: nay more, with her consent, if living, they can so apply the fund settled on the husband's side, except only such part thereof as belonged to the husband himself at the date of marriage, or has since fallen in under his covenant, if any, for settlement of his after-acquired property: para. 12. But it is essential that the husband's veto be made to cease on his bankruptcy, etc., for if it continued afterwards, then the power could only be exercised with the consent of his trustee in bankruptcy, who would not of course consent except upon due consideration: *Re Cooper*, 27 Ch. D. 565; *Bedingfield and Herring*, [1893] 2 Ch. 382.

In this way the most that the husband's trustee in bankruptcy would have to sell is the contingent reversionary life interest of the husband in the husband's fund: an interest which the trustee would be glad to sell cheap to a relation or friend of the family who might perhaps purchase it for the benefit of the family.

As, however, such an advancement clause would in practice prevent a parent raising any charge until it was certain that there could be no issue of the marriage, and as this might prove inconvenient, the writer suggests giving a power to the trustees at discretion to release the trust property or any part thereof from this clause, or to postpone its operation to any encumbrance created by a parent.

It is needless to say that special instructions would be required for the insertion of such a clause.

"Powers to be inserted if the ultimate trusts of the wife's fund be limited as in paras. 20, 21 above suggested."

(28) We have noticed above (para. 21) that if the wife is given only the limited ultimate trust adumbrated in para. 20, she should be given power by deed to appoint the whole of her fortune in settlement on her husband and issue of a second and future marriages in the event of no child of the present marriage attaining twenty-one or being female marrying, even though if such a child does attain a vested interest it is not intended that the wife shall have power to settle any part of her fortune on her second marriage.

"The same."

(29) But when the wife settles substantially the whole of her fortune on her marriage, more especially if she covenants to settle her after-acquired property, she ought to have power to withdraw and settle some proportion of her fortune on her second marriage—

usually varying according to the number of the children of her first marriage who attain a vested interest.

“*The same.*”

(30) These powers are usually given to the wife in terms only if she survives her first husband. There is, however, no rule of public policy precluding the power being given as exercisable also after the dissolution of her marriage with her intended first husband. But under its statutory jurisdiction the Divorce Court has in such case power of varying settlements though there be issue of the first marriage, and may accelerate the power, reduce it in quantum of exercise, postpone its exercisability, or extinguish it; and may actually confer the power, though none such be given in the settlement. Moreover, where under the limited ultimate trust the wife is given power to appoint by will only, as she exercising that power can exclude all those who would take in default of her exercise of that power, the Court may assume jurisdiction at once also to exclude such persons and to restore to her her fortune: and may in certain cases even though she has no power of appointment by will do the same.

The above powers being exercisable not “for her own benefit”, which means her own *exclusive* benefit (*Re Taylor's Settlement*, [1929] 1 Ch. 435), are not exercisable by the wife's trustee in bankruptcy should she go bankrupt: *B. A.*, 1914, ss. 38 (2) (b), 55 (4); cp. *Re Masters' Settlement*, [1911] 1 Ch. 321; and *ante*, para. 24.

“*As to charging the wife's otherwise full life interest with maintenance for the issue, etc.*”

(31) Where the wife settles the whole or substantially the whole fund and is given in the first instance a full life interest, the interests of the children could be to some extent protected during her life, by charging her life interest with their maintenance and education either generally or while they were under age, and in the latter case, if desired, at the discretion of the trustees with allowances for adult children including married daughters: and this might be done as charging her life interest as survivor only as from the husband's death.

In such case though the wife goes bankrupt the Court may direct an inquiry as to which of the issue should be maintained, though it cannot totally exclude the wife or her assignees: *Re Booth*, [1894] 2 Ch. 282; *Carr v. Living*, 28 Beav. 644; 33 Beav. 474; *Re G. (Infants)*, [1899] 1 Ch. 719, 724.

“*As to discretionary trust only in inception.*”

(32) A remaining but unsatisfactory way in which to protect a wife against herself and her husband is to give her no certain interest at all, but to make her from the beginning and during her life one only of several objects of a discretionary trust.

But the intending wife could hardly be expected to settle her own property in this way; and her father or other relation settling his property with her can secure by the protective trusts above noticed (see paras. 11 and 12) all protection required for her.

“*That the Act does not abolish tenancy by the curtesy.*”

(33) There can be little doubt that the L. R. Act, 1935, will not affect the husband's tenancy by the curtesy where it would still exist after the A. E. A., 1925. As to Tenancy by the Curtesy, see the writer's article 43 L. Q. R. 87.

The Act does not say that the lady is to be considered a *feme sole*, but says only that her property “shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly”: which means she is to have the legal as well as equitable ownership. If she does not desire to dispose of it, the former law will remain: cp. *Hope v. Hope*, [1892] 2 Ch. 336.

F. E. FARRER.

CONDITIONS OF SALE OF LAND.

By E. O. WALFORD, LL.D., Solicitor.

(Continued from p. 29.)

Law Society's General Condition.

POSSESSION BEFORE COMPLETION.

6.—Where, under the contract or otherwise, a purchaser is authorised to take possession of the property before the actual completion of a purchase, then (save as otherwise agreed) the following provisions shall apply :—

- (1) The taking of possession shall not be deemed to be—
 - (a) an acceptance by the purchaser of the vendor's title,
 - (b) a waiver of the right of the purchaser to make requisitions or objections in respect of the title.
- (2) A purchaser who takes possession shall, from the date of taking possession, and until the time of actual completion, or until the vendor resumes possession by reason of the rescission of the contract—
 - (a) keep the property in as good a state of repair and condition as it was in at the time of taking possession,
 - (b) pay all rents, rates, taxes, costs of insurance and of repairs, and other outgoings in respect of the property,
 - (c) be entitled to receive the rents and profits as if the date fixed for completion had arrived,
 - (d) pay interest on the purchase money or the balance thereof at the rate specified in the next following condition.
- (3) If the sale is rescinded the purchaser shall—
 - (a) forthwith deliver up possession of the property

to the vendor, in as good a state of repair and condition as aforesaid,

- (b) apply any insurance money received by him in respect of the property, in making good any loss or damage to the property, or otherwise account for the same to the vendor.

- (4) Provided that (subject to the requisite apportionment being made of all rents, rates, taxes, costs of insurance and of repairs, and other outgoings and without prejudice, in case of the purchaser's default, to the rights of the vendor under Condition 32) the vendor shall repay to a purchaser whose contract is rescinded, his deposit money, if any (including any purchase money previously paid), but without interest thereon, and the purchaser shall return forthwith all abstracts and papers in his possession belonging to the vendor, and shall not make any claim on the vendor for costs, compensation or otherwise.

It is sometimes stated that if before delivering any objections or requisitions in respect of the title a purchaser takes possession of the property, he is deemed to accept the title. It is true that specific performance has been decreed without an inquiry as to title in such circumstances : *Anspach v. Noel* (1816), 1 Madd. 310 ; *Fleetwood v. Green* (1809), 15 Ves. 594. The authorities appear to show that where the purchaser has taken and held undisputed possession of the property for a substantial period, such as two years, without inquiry into the title, it will be readily assumed that he has accepted the vendor's title, and has waived all rights of investigation : *Sibbald v. Lowrie* (1853), 2 Eq. Reports 485 ; *Deller v. Simonds* (1859), 34 L. T. (o.s.) 43.

Very slight acts of ownership are sufficient to raise the presumption of acceptance of the title if they take place after knowledge of the defect in title : *Dixon v. Astley* (1816), 1 Mer. 133 ; 19 Ves. 564. Thus where the purchaser had knowledge of the existence of certain rights of sporting and thereafter took possession of the property without raising objection to such rights, he was held to be precluded from taking any objection on this account at a later date : *Burnell v. Brown* (1820), 37 E. R. 339 ; 1 Jac. & W. 168. Any dealing by the purchaser with the property will be taken as evidence of an intention to accept the title. Thus if he purports to deal with the property as owner by granting a lease to a third party, he will be deemed to accept the vendor's title :

Re Barrington (1835), 2 Mont. & A. 146; 4 L. J. Bk. 27; 4 Deac. & Ch. 693; see also *Haydon v. Bell* (1838), 48 E. R. 970; 1 Beav. 337, and *Bown v. Stenson* (1857), 24 Beav. 631; 53 E. R. 501. The more recent case of *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320; 52 L. J. Ch. 654, illustrates this proposition. There the vendor was aware that the property was subject to restrictive covenants although the contract did not provide that the purchaser should take subject to such covenants. The purchaser having made certain structural alterations in the premises was held to have waived any objection to the covenants. It would seem that the rule governing the taking of possession as affecting the acceptance of title is as follows. The taking of possession by a purchaser will be deemed to constitute an acceptance of the title and of all defects therein known to the purchaser at the date on which possession is taken by him, provided that such possession is not taken pursuant to an arrangement with the vendor (whether contained in the contract or not) entitling the purchaser to possession pending completion, and provided that the purchaser does not expressly object to the title at the time when he takes possession. As to the last qualification it was observed by Plumer, V.-C., in *Knatchbull v. Grueber* (1815), 1 Madd. 153, "a man by going on to treat does not waive an objection he is continually insisting upon". And see *Turquand v. Rhodes* (1868), 37 L. J. Ch. 830; *Burroughs v. Oakley* (1819), 3 Swan. 159. It should be emphasised that if the contract provides that the purchaser is to have possession pending completion it is to be presumed that he is to have beneficial possession, and therefore if he acts as owner of the property, such acts will not constitute an acceptance of the title: *Stevens v. Guppy* (1828), 3 Russ. 171; 6 L. J. (o.s.) Ch. 164. It is not, however, suggested that a purchaser in such circumstances would be entitled to carry out prior to completion extensive alterations to the property, and it is submitted that the acts which the purchaser could properly do, without an implied acceptance of the title, would be limited to those which a prudent and reasonable man would do for the convenient occupation of the property prior to the acceptance of his vendor's title. It is suggested that such acts could not include any works of such a nature as to change the character of the buildings so as to prevent its reinstatement to its former condition. There would appear to be no express decision upon this question; but the authorities cited above go to show that where there is no provision in the contract as to the giving of possession, a purchaser who acts as if he had become the absolute owner of the property cannot be heard to say later that he has not actually and finally taken over the property, and

waived any further right of rescission, even though the property which he has contracted to buy is saddled with certain irremovable liabilities, such as restrictive covenants.

It was laid down in *Worthington v. Warrington* (1849), 8 C. B. 134, that a purchaser who has entered into possession ought before he makes substantial alterations in the property to satisfy himself that the vendor has a good title to the property and that if after considerable moneys have been expended by the purchaser it transpires that the vendor is unable to make title in accordance with the contract, the purchaser cannot recover from the vendor the amount by which the property has been increased in value owing to any improvements effected by the purchaser. It certainly behoves a purchaser to investigate the title before spending moneys upon the property since it is clear, at any rate where the vendor honestly believes that he can make title in accordance with the contract, that the only damages which are recoverable if it proves that he was mistaken are the expenses of investigation of the title (*Sikes v. Wild* (1863), 4 B. & S. 421; 32 L. J. Q. B. 375; *Ponnsett v. Fuller* (1856), 17 C. B. 660; 25 L. J. C. P. 145; *Hodges v. Litchfield* (1835), 1 Bing N. C. 492), and interest on the deposit paid by him : *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513.

It is true that in *Sherry v. Oke* (1835), 3 Dowl. 349, it appears to have been held that a purchaser was entitled to recover interest on the purchase-money which he had kept idle pending completion; but it seems that in this case the matter had proceeded sufficiently far before the breach occurred to render it reasonable that the purchaser should have the moneys immediately at call and thus non-productive of interest. But the purchaser cannot recover as damages a loss arising from the sale of investments which have been realised in order to meet the payment of the purchase-moneys : *Flurean v. Thornhill* (1776), 2 W. Bl. 1078; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243.

The limitation of damages as above mentioned does not apply where the vendor wilfully refuses, on the ground of expense or otherwise, to take some essential step towards the completion of the contract. So where a mortgagee contracted to sell certain property with vacant possession and later refused to take proceedings against the mortgagor in order to obtain and deliver possession to the purchaser, it was held that the purchaser was entitled to recover the loss of profit on his proposed sub-sale and the expenses of investigating title : *Engell v. Fitch* (1869), L. R. 4 Q. B. 659.

So where A, one of five co-owners, contracted for himself and his co-owners to sell a certain property, but having no authority

from his co-owners was unable to carry out the contract, it was held that A was liable to pay, in addition to the costs of investigating the title, the costs of an unsuccessful action against all the co-owners (in which the other joint owners swore that A had no authority to make the contract on their behalf) and the difference between the price at which A had purported to sell and the market value of the property. It was further held that the price at which the property had later been sold was evidence of the market value : *Godwin v. Frances* (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121.

It would seem that although not guilty of bad faith, a vendor who undertakes to sell a property which is mortgaged together with other premises, but is unable to perform the contract owing to the fact that the mortgagee will not release the property except upon payment of the whole of the mortgage moneys, is also liable in damages to the purchaser for loss of the bargain : *Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405; 87 L. J. Ch. 69. The purchaser was also held to be entitled to damages for loss of his bargain where the vendor purported to sub-sell, but was unable to obtain a conveyance from his vendor : *Hopkins v. Grazebrook* (1826), 6 B. & C. 31; and also where the defendant sold to another party in spite of an existing contract with the plaintiff : *Goffin v. Houlder* (1920), 90 L. J. Ch. 488.

It must, however, be remembered that a well-drawn contract usually contains an express right of rescission in the event of the purchaser insisting upon any objection or requisition which the vendor is unable or on the ground of expense unwilling to remove or comply with, and if such a power is reserved to the vendor the test is whether the vendor has a *bona fide* belief that he will be able to convey the interest which he has contracted to assure to the purchaser, and substantial grounds for such belief : *Merrett v. Schuster*, [1920] 2 Ch. 240; 89 L. J. Ch. 399. The point is, however, that such grounds although reasonable may be mistaken, but the vendor may nevertheless be entitled to rescind the contract, in which event, in accordance with the concluding portion of the standard rescission clause, the purchaser will be entitled only to the return of his deposit, without interest, in full satisfaction of all claims.

A consideration of the cases above cited will therefore lead to the conclusion that although the contract may provide that the purchaser is to be let into possession or receipt of the rents and profits pending completion, this is by no means the end of the matter, and a purchaser so entering would be well advised to expend no substantial sum of money upon the property until the title has at least been properly investigated and found to be satisfactory.

Indeed, the only safe advice to a purchaser in such circumstances is that he should await the actual conveyance to him of the property. If, however, after a marketable title has been deduced and verified, the contract is registered against the vendor as a land charge under the Land Charges Act, 1925, so as to prevent any subsequent mortgagee or purchaser from obtaining priority, it would seem that the risk involved in expending moneys on the property thereafter would be small.

At the same time it will be appreciated that at such a stage the completion could normally follow within a few days and therefore it would be simpler to effect completion rather than to register a land charge. It is therefore only in abnormal cases that the registration of a land charge at such a stage will be of assistance. An example of such a case would arise where the title deduced is satisfactory but one of the vendors is in Australia or some other distant place, or where the contract for sale has been approved by the Court but the purchaser does not wish to wait for the formal approval by the Court of the form of the conveyance. It will be seen that the Law Society's Condition 6 (2) regulates the position of the parties during the period between the date on which possession *is taken* and the date of actual completion or the date when the vendor resumes possession. It is apprehended that the only respect in which this section of the condition varies the position at common law where the purchaser takes possession by agreement in the contract is that under the Law Society's Condition interest is payable by the purchaser on the balance of the purchase-money from the date on which possession is taken. It may, however, occur owing to the default of the purchaser, or to other considerations, that possession may not in fact be taken, although the purchaser is "authorised" by the contract to do so, and this may result in a substantial loss to the vendor if he actually removes from the property in order to leave the property vacant for the purchaser, in the belief that interest will be paid on the balance of the purchase price from the date of contract. It should therefore be expressly stipulated in such cases that in Condition 6 (2) of the Law Society's Conditions the words "the date of the contract" shall be substituted for the words "the date of taking possession".

Sub-clauses (3) and (4) of Condition 6 deal with the position in the event of the rescission of the contract, but do not make any distinction between cases in which the contract is rescinded by the vendor and those in which the purchaser rescinds the contract, nor is any distinction taken between cases in which the rescission is justifiable and those in which it is unjustifiable. We

can at once dismiss from consideration the latter class of case. Although the provisions of Condition 6 (4) award to the purchaser whose contract is rescinded the return of his deposit but no interest thereon nor any costs or other compensation, it is abundantly clear that this provision can only extend to those cases in which the contract is properly rescinded. As has been pointed out above the usual rescission clause will enable a vendor to rescind without compensating the purchaser except to the extent agreed upon in the contract if, but only if, he had a *bona fide* belief, based upon substantial grounds, that he could in fact convey the interest which he had contracted to sell: *Merrett v. Schuster (supra)*.

Where the purchaser becomes entitled to rescind the contract the position must depend on the circumstances in which the right of rescission arises, and upon any other conditions which may have a bearing upon the question.

Sub-clause (4) of Condition No. 6 above must be assumed to relate to a lawful rescission, but not merely to a rescission by the vendor. If the purchaser is the party rescinding sub-clause (4) still applies, and the vendor's only obligation is to return the deposit to the purchaser without interest. At common law, if the purchaser elected to proceed against the vendor in respect of his wilful failure to implement the contract, heavy damages might be awarded: *Williams v. Glenton* (1866), 1 Ch. App. 200 (*per Turner, L.J.*). It would seem from the authorities undesirable that a purchaser should elect to rescind, but rather that in any proceedings he should affirm the contract, and claim damages for the breach by the vendor of the terms of the contract.

It is to be observed that the condition under consideration does not provide for readjustment of the position on the basis that the purchaser is, in the event of rescission, to account for the rents less outgoings from the date on which possession is taken up to the date on which possession is resumed by the vendor. It would seem unfortunate that this question should not have been expressly covered, and the words "subject to the requisite apportionment being made of all rents, rates, etc.," in sub-clause (4) do not assist materially. The purchaser in possession may well have received rent in advance of the date on which the vendor retakes possession, in which case a readjustment will obviously be equitable. On the other hand the purchaser may well have incurred material expense in setting about the collection of rents payable only in respect of the period during which he has been in possession. In such a case some hardship may rest upon the purchaser if he is compelled, by rescission of the contract, to hand over all rents received. Nevertheless, it is apprehended that there is nothing in the Law

Society's Condition No. 6 to displace the general rule that the purchaser must pay over to the vendor the whole of the rents received (less rates, taxes, insurance premiums and other outgoings, and a certain sum for repairs effected), the essential feature of rescission being that the parties are to be restored to their original position so far as is practicable. No doubt the question of the amount to be allowed for repairs will be difficult in some cases. The purchaser is, however, only required under Condition 6 (2) (a) to keep the property in as good a state of repair and condition as it was in when the purchaser took possession, and the amount allowable would therefore appear to be confined to repairs essential to the preservation of the property. This point again emphasises the risk which a purchaser runs if he decides after taking possession to embark upon improvements or even substantial repairs before satisfying himself as to his vendor's title.

INTEREST ON PURCHASE-MONEY.

(a) *In absence of special stipulation.*

Under an open contract it is well settled that a purchaser is liable to pay interest on the purchase-money from the date when he could prudently take possession, that is to say from the date when a good title is shown: *Re Spencer Bell* (1885), 1 T. L. R. 435; *Re Pigott and Great Western Ry.* (1881), 18 Ch. D. 146; 50 L. J. Ch. 679. But a good title is not shown, in this sense, if there is a mortgage upon the property and there is as yet no indication that the mortgagee will join to assure the property to the purchaser: *Wells v. Maxwell* (No. 2) (1863), 32 Beav. 550.

If, however, a date for completion and payment of the purchase price be fixed by the terms of the contract it is, of course, clear that not only must a good title have been shown, but the time for completion must have arrived. Further, the older cases which refer to payment of interest from the date on which a good title is shown are not to be read as meaning the date on which a proper abstract of title is delivered. A reasonable time will be allowed thereafter for verification of the abstract. Thus, in *Re Keeble & Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383, a period of ten days was allowed for verification of the abstract and interest was charged on the purchase-money from the expiry of the ten days. The principle to be extracted from the authorities is that the purchaser is liable in such cases to pay interest only from the time when with reasonable diligence he might have completed the purchase: *Boehm v. Wood* (1823), 1 L. J. (o.s.) Ch. 234.

The fixing of a date for the completion of the purchase will not entitle the vendor to interest on the purchase-money in the

absence of an express stipulation to that effect : *Catling v. Great Northern Ry.* (1869), 21 L. T. 769 ; *Jones v. Mudd* (1827), 4 Russ. 118, 6 L. J. (o.s.) Ch. 26.

When interest is held to be payable under an open contract it is generally allowed at £4 per cent. per annum : *Re Keeble, etc.* (*supra*), *Re Davy*, [1908] 1 Ch. 61 ; *Re Cooke*, [1916] 1 Ch. 480 ; *Esdaile v. Stephenson* (1822), 1 Sim. & St. 122. Where the interest purchased is a reversion and no date for completion is fixed, it seems that the vendor, showing a good title, may claim interest on the purchase price (at 4 per cent.) from the date of the contract : *Trefusis v. Clinton* (1828), 2 Sim. 359. The principle governing such cases is that the reversion automatically increases in value by mere effluxion of time, and once the price is fixed and the bargain struck on the basis of the then value of the reversion, the purchaser, upon completing, takes the benefit of the increase in value of the reversion between the date of the contract and the actual completion of the purchase. The completion, therefore, takes place upon the footing that the purchaser has been in possession of the reversion from the date of the contract, and he is therefore liable to pay interest on the purchase price from that date up to the date of actual completion of the purchase.

If, however, a time is fixed by the contract for the completion of the purchase of the reversion, interest will not be allowed to the vendor from the date of the contract but only from the date fixed for completion : *Bailey v. Collett* (1854), 18 Beav. 179 ; 23 L. J. Ch. 230. For the reason given above, in the last-mentioned case, the delay of the vendor in completing the sale will not disentitle him to interest from the date fixed for completion provided he ultimately makes a good title within a reasonable time : *Lewis v. Tucker* (1841), 5 Jur. 1105 ; but see and compare *Growsock v. Smith* (1797), 3 Anst. 877.

A purchaser in default is only liable to pay interest on the balance of the purchase-money if he has already paid a deposit, even though his action in insisting upon an untenable requisition has caused the delay : *Bridges v. Robinson* (1811), 3 Mer. 694.

The rules enunciated above apply to cases where the purchaser has not entered into possession pending completion. In such cases the general rule is that the purchaser must pay interest at 4 per cent. from the date of possession. In *Fludyer v. Cocker* (1805), 12 Ves. 25, Grant, M.R., observed : "The act of taking possession is an implied agreement to pay interest : for so absurd an agreement, as that the purchaser is to receive the rent and profits to which he has no legal title, and the vendor is not to have interest as he has no legal title to the money, can never be implied."

Although (as will be mentioned more fully later) a purchaser may even though in possession prevent interest from running against him by appropriating the balance of the purchase price to meet his liability and giving notice to the vendor of such appropriation, he cannot remain in possession of the property and claim to be relieved of liability for interest merely on the ground that the vendor has not yet shown a good title to the property : *Greenwood v. Mitchell* (1845), 8 Beav. 413; 14 L. J. Ch. 143; *Adams v. Heathcote* (1846), 10 Jur. 301; 7 L. T. (o.s.) 317; *Cowpe v. Bakewell* (1851), 13 Beav. 421. So where a price was fixed for a freehold interest and the purchase-money was to be paid on a certain date, the purchaser being and remaining in possession of the property was held liable to pay interest at 4 per cent. on the purchase money for a period of several years which had elapsed before the vendor was able to convey the freehold to the purchaser : *Att.-Gen. v. Dean of Christ Church, Oxford, Ex. p. Maddox* (1842), 12 L. J. Ch. 28; 13 Sim. 214; and see *Birch v. Joy* (1852), 3 H. L. Cas. 565.

Where a purchaser retains possession after the date fixed for completion without completing the purchase, the Court will in general give him the option, if proceedings are taken by the vendor for specific performance, of giving up possession or of paying the purchase-money into Court together with interest thereon from the date fixed for completion, even though no objection has been made to the title; but such option will not be given if the purchaser has meanwhile taken any action which would prejudicially affect the value of the property as a security for the purchase price : *Greenwood v. Turner*, [1891] 2 Ch. 144; 60 L. J. Ch. 351; *Re Cassano and Mackay's Contract* (1919), 64 S. J. 259.

The fact that the purchaser has received no rents and profits from the property and has not had the beneficial occupation thereof will be no answer to a claim for interest if he has done anything which amounts to the taking of possession in the ordinary sense in which that term is used. Thus, where the purchaser entered upon certain vacant land which he had contracted to purchase and put up a notice board, he was held liable to pay interest thereafter, although the vendor was responsible for the delay in completion : *Ballard v. Shutt* (1880), 15 Ch. D. 122; 49 L. J. Ch. 618.

A purchaser under an open contract may, however, if not otherwise in default, escape the payment of interest by doing two things—

- (i) Appropriating the purchase-money or the balance of the purchase-money to the transaction, and
- (ii) Notifying the vendor of such appropriation.

(See *Howland v. Norris* (1784), 1 Cox Eq. Cas. 59; *Bennett v. Stone*, [1903] 1 Ch. 509.) The purchaser will not, however, be relieved of liability on the ground that his money was in fact lying idle, if he has not notified the vendor to that effect: *Powell v. Martyr* (1803), 8 Ves. 146 (*per Grant*, M.R.). In a case where the purchase price was £38,500, and after delay on the vendor's part the purchaser deposited £38,000 on deposit account at a bank and notified the vendor that he would not be responsible for further interest, it was held that the purchaser was not liable to pay interest on the sum deposited, although it was not the full amount of the purchase price: *Kershaw v. Kershaw* (1869), L. R. 9 Eq. 56; 21 L. T. 651. If the appropriation is made in the form of stock or other investment, then the purchaser takes the risk of any loss, which he must make good, and similarly takes the benefit of any capital appreciation in the value of the investment beyond the amount of the purchase price; but the vendor takes all interest actually earned: *Roberts v. Massey* (1807), 13 Ves. 561.

(b) *Special conditions as to interest.*

The foregoing observations apply where the contract contains no special stipulation as to interest. The position may, however, be varied by contract, and it is convenient at this stage to set out the Law Society's Condition.

Law Society's General Condition.

INTEREST ON PURCHASE MONEY.

7.—(1) If from any cause whatever (save as hereinafter mentioned) the completion of the purchase is delayed beyond the date fixed for completion, the purchase money, or where a deposit is paid, the balance thereof, shall bear interest at the rate of £5 per cent. per annum from the date fixed for completion to the day of actual payment thereof.

(2) Provided that, if delay in completion arises from any other cause than the purchaser's own act or default, the purchaser may (except in a case to which Condition 6 applies)—

(a) at his own risk, deposit the purchase money, or where a deposit is paid, the balance thereof, at any bank in England or Wales, and

(b) give notice, in writing, forthwith of such deposit, to the vendor or his solicitors,

and in that case the vendor shall (unless and until further delay in completion shall arise from the purchaser's own act or default) be bound to accept the interest, if any, allowed thereon, as from the date of such deposit, in lieu of the interest accruing after the date of the deposit, which would otherwise be payable to him under this condition.

(3) No interest shall become payable by a purchaser if and so long as delay in completion is attributable to—

(a) default by the vendor in deducing title in accordance with the contract, or in giving an authority to inspect the register kept under the Land Registration Act, 1925, or in conveying; or

(b) any other act or default of the vendor or his Settled Land Act trustees.

(4) The Vendor shall, as from the date when interest becomes payable under paragraph (1) of this condition, have the option (to be exercised in writing at any time before actual completion and before a deposit of the purchase money or the balance thereof under paragraph (2) shall have been made) of taking the rents and profits or an apportioned part thereof (as the case requires) less the outgoings or an apportioned part thereof, up to the date of actual completion, in lieu of the interest otherwise payable under the said paragraph (1); and, if the said option is exercised, the same payments, allowances and apportionments shall be made as if the date fixed for completion had been the date of actual completion.

It is suggested by the writer that at the present time a more reasonable rate of interest is £4 per cent. or at most £4 10s. per cent. and that the purchaser's solicitor should endeavour to obtain a special condition amending the rate accordingly.

It will be observed that the above condition proceeds upon the basis that, in general, any interest must be paid by the purchaser in the event of delay in the completion of the purchase, from whatsoever cause such delay may proceed. In order that he may be freed from this obligation the purchaser must establish one of two things:—

(a) That the delay has arisen from some cause other than the purchaser's own act or default, and that he has deposited the purchase money, or the balance of the purchase money, at a bank in England or Wales and has given notice in writing to the vendor of such deposit. If these

steps are taken then the position is as follows. As from the date on which such notice is given the vendor is bound to accept such interest (if any) as is earned upon the deposited sum, in lieu of interest at 5 per cent. per annum, until completion, or until such earlier date as further delay in completion arises from the purchaser's own act or default.

The purchaser cannot, however, avail himself of this procedure in order to prevent interest from running, where under the contract or otherwise the purchaser has been authorised, before the deposit has been made, to take possession of the property before the actual completion of the purchase. It would seem, although not so stated in clause 6 or 7 of the Law Society's Conditions, that this exception only applies where the authority to take possession has been given before the deposit has been made. Any other interpretation would give to the vendor the power to nullify the effect of the deposit by authorising the purchaser to take possession, although the purchaser was quite unwilling to do so owing to the state of the title, or upon some other proper and reasonable ground.

- (b) The purchaser will also be freed from the obligation to pay interest, without making any deposit if he can show that the delay in completion is attributable to any act or default of the vendor or his Settled Land Act trustees. Sub-clause 3 (a) of Condition 7, which refers to default in deducing title, or in giving an authority to inspect the register at the Land Registry, which appears at first sight merely to give two isolated instances of default by the vendor, may possibly have been inserted to meet the decision of *Re Woods and Lewis*, [1898] 1 Ch. 433; 2 Ch. 211. In that case the contract provided that the purchaser should pay interest if from any cause "other than the default of the vendor" the completion should be delayed. There was a defect in the vendor's title which the purchaser's solicitors discovered. The vendor was unaware of this defect; but the result was that the completion was delayed for approximately three months whilst the defect was being rectified by a deed of confirmation. It was held that the purchaser was nevertheless liable to pay interest on the balance of the purchase price. The purchaser had not put the balance of the purchase money on deposit and given notice to the vendor, and it appears that he would have gained nothing by doing so. If the

vendor's title is unsatisfactory the purchaser may be justified in rescinding; but if he elects to proceed with the purchase and the contract provides that interest shall be payable unless the delay is caused by the vendor's default it is clear from the case of *Riley to Streatfield* (1886), 34 Ch. D. 386 that delay arising from a technical defect in the title will not discharge the vendor from liability to pay interest.

The writer is, however, doubtful whether the words "default by the vendor in deducing title in accordance with the contract" or "any other act or default by the vendor" occurring in Condition No. 7 (3) would include a delay arising from a technical defect in title appearing from the abstract when delivered, at any rate if such defect was not known to the vendor. In such cases it would appear most desirable that the balance of the purchase money should be placed on deposit in accordance with Condition 7 (2).

Condition 7 (3) appears to be based on Condition 4 (3) of the Statutory Conditions of Sale, but with two important differences. According to the Statutory Conditions no interest is payable in the case of "refusal" to deduce title, or to give an authority to inspect the register, or to convey, or any other *wilful* act or default by the vendor (or his Settled Land Act trustees). It is certainly clear that this Statutory Condition would not exempt the purchaser from liability to pay interest where the delay in completion arises from some unsuspected defect in the title. As Statutory Condition 4 (2) gives the purchaser the same right as the Law Society's Condition of depositing the purchase price, in order to prevent interest from running, there appears to be little practical difference in the effect of the two conditions in such a case. There is, however, in general a substantial difference between "default" and "wilful default". In the case of *Re Young and Harston's Contract* (1885), 31 Ch. D. 168, Bowen, L.J., said that default meant not doing what was reasonable in the circumstances and that the word "wilful" did not imply anything blameworthy, but merely the result of the spontaneous action of the will. "It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." Again, it has been observed in *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269 that moral delinquency, intentional delay and wilful obstruction on the part of the vendor may all be absent and yet there may be wilful default.

It is, however, one thing to lay down general principles and

another to apply them to particular facts or circumstances. The case of *Bennett v. Stone*, [1903] 1 Ch. 509 is an interesting illustration of the difficulty which may arise in determining, first, whether the conduct in question did in fact cause delay in completion, and, secondly, whether the default was wilful. In that case the vendor threatened to repudiate the contract if the purchaser did not accept an alteration made by the vendor in the draft conveyance. The case came before the Court of Appeal with the following result:—

- (i) Cozens-Hardy, L.J., considering that the vendor's conduct, though mistaken, was honest, thought that there was no wilful default by the vendor.
- (ii) Vaughan Williams, L.J., was of opinion that the insistence of the vendor upon his alteration of the draft conveyance together with the threat to repudiate the contract did constitute wilful default, and further that such default had caused the delay.
- (iii) Stirling, L.J., on the other hand, considered that the vendor's conduct had not caused the delay, but agreed with Vaughan Williams, L.J., that such conduct did amount to wilful default.

The result, therefore, was that although the majority of the Court considered that there had been wilful default by the vendor, there was yet a majority ruling that there was no wilful default causing the delay in completion.

Re London Corporation and Tubbs' Contract, [1894] 2 Ch. 524 is an authority for the proposition that where the vendor misdescribes his title in the conditions of sale, owing to carelessness, and thus delay arises in the delivery of the abstract of title, this is not wilful default by the vendor. On the other hand, where the vendor knows of difficulties which have to be surmounted before completion and hopes to overcome them before the date fixed for completion, then any delay which arises owing to the vendor's inability to dispose of such difficulties amounts to wilful default: *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, and see *Re Earl Strafford and Maples*, [1896] 1 Ch. 235, 240.

The condition requiring payment of interest in the event of any delay may either be unqualified or may contain such qualification as the parties think fit. We have sufficiently considered the cases in which the purchaser is exempt from liability to pay interest only if the delay is due to the vendor's default. Other forms of condition have received judicial consideration and may now be dealt with:—

(a) *Interest payable if delay arises from any cause whatever.*

A provision of this kind does not mean precisely what it says, for it is well settled that the words "other than the wilful default of the vendor" must be deemed to be added: *Palmerston v. Turner* (1864), 33 Beav. 524; and see *Williams v. Glenton* (1866), 1 Ch. App. 200.

Instances of cases in which the purchaser has been held liable for interest under such a condition are as follows. In *Palmerston v. Turner* (1864), 33 Beav. 524; 33 L. J. Ch. 457, the vendors had to take proceedings to rectify the power under which they had sold, and in spite of the delay the purchaser was held liable to pay interest. In the case of *Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517; 2 Eq. Rep. 957, the date for completion was April 25, 1844. As to part of the property no abstract was delivered till the end of November, 1844, and a good title was not established until over two years later. The vendor was due under the contract to deliver his abstract three months before April 25, 1844, but had not delivered it until March 1, 1844. An allowance was therefore made by the Court of a period of three months from the delivery of a complete abstract (the end of November, 1844), thus bringing the date for completion forward until the end of February, 1845. The purchaser was held liable to pay interest from March 1, 1845, and it was laid down by the Court that where there is no vexatious conduct, wilful delay or unfair dealing by the vendor, defects in the title which cause delay will not free the purchaser from liability to pay interest, and that it is not incumbent upon a vendor who sells under such a stipulation to show that he has done everything requisite to make the contract capable of immediate completion, in order to maintain his right to the payment of interest.

The case of *Vickers v. Hand* (1859), 26 Beav. 630 is to the like effect, except that there the purchaser was to take the rents from March 25 although completion was not to take place until June 24, and the abstract, although delivered later than the date specified by the contract, was in fact delivered seven days before the date fixed for completion, and the purchaser was held to be liable to pay interest from the date fixed for completion.

In *Williams v. Glenton* (1866), 1 Ch. App. 200, the purchaser was compelled to pay interest in respect of delay arising out of partition proceedings by the vendor and his executors in order to carry into effect the contract.

The examples given above have been selected on account of the exact words used in the contracts. It will, however, be appreciated that the condition which we have just considered is precisely similar in effect to all other provisions under which the

purchaser is bound to establish that there has been *wilful* default by the vendor. Before leaving this class of case it is desirable to mention that a number of the earlier cases clearly conflict with the later ruling cases and are, according to the better opinion, to be regarded as overruled. In particular there may be mentioned the following: *De Visme v. De Visme* (1849), 1 Mac. & G. 336, which is either to be accepted as limited to the facts of that particular case or (as Romilly, M.R., considered in *Vickers v. Hand*, *supra*) as overruled by *Sherwin v. Shakspear* (1854), 5 D. M. & G. 517 (*supra*). Other cases which fall within this category are *Re Gold and Norton's Contract* (1885), 52 L. T. 321 (*supra*) in so far as it is an authority for the now rejected view that the appropriation of the purchase price will prevent interest from running against the purchaser notwithstanding the terms of the contract; *Robertson v. Skelton* (1850), 12 Beav. 363 (interest payable only from date when title made out).

- (b) *Cases in which it is provided that the purchaser "in default" shall pay interest, or that interest shall be payable "if delay in completion shall arise from any act or default of the purchaser", or "if from any cause whatever" the purchase money shall not be paid on the due date "the purchaser making default shall pay interest"*.

Here the case is different, for if the vendor's own delay has caused the completion to be postponed, or if vendor's title is defective or for any other reason the vendor is not in a position to carry out the sale and to give to the purchaser a valid conveyance in accordance with the contract by the date fixed for completion, he cannot recover interest from the purchaser: *Denning v. Henderson* (1847), 1 De G. & Sm. 689; *Jones v. Gardiner*, [1902] 1 Ch. 191; *Perry v. Smith* (1842), 1 Car. & M. 554. In the case last mentioned part of the delay was occasioned by the vendor and part by the purchaser, and the purchaser was held liable to pay interest only in respect of the delay for which he was himself responsible.

In *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648, it was held that if a purchaser raises an untenable requisition any delay occasioned by such requisition amounts to default by the purchaser. It was there laid down that although a person guilty of a breach of duty is no doubt guilty of default, yet in considering whether a person is under a duty the Court will be guided by the nature of the contract and all the circumstances of the case. There is no rule that in order to establish default it must be shown that such conduct was unreasonable. The phrase

“doing what is reasonable under the circumstances”, used by Bowen, L.J., in *Re Young and Harston* (1885), 31 Ch. D. 168, and already referred to above, means doing what a person ought to do having regard to his relations towards other persons, and does not suggest any standard based on what a prudent man would do for his own protection. The rule suggested in *Re Young and Harston* that a vendor of real estate is not guilty of default so long as he acts reasonably having regard to his relations towards other persons interested in the contract applies to purchasers as well as to vendors. In this case, although the purchaser had acted reasonably and as a prudent man in the protection of his interests by proceedings terminating adversely to him in the House of Lords (where a requisition delivered by him was held to be untenable), he had committed a breach of duty towards the vendor in repudiating the contract although the title was good. He was therefore “in default” and liable to pay interest under the contract.

It may be said of such a condition that it leaves the parties in the same position as if the contract were silent upon the question except of course that the rate of interest may be different.

(c) *Cases in which it is stipulated that interest shall be paid if the purchase is not completed, without any reference to the cause of the delay, or where it is stated that “under no circumstances shall the purchaser be excused from paying interest from the date fixed for completion until payment of the purchase money.”*

Either of such provisions will render the purchaser liable to pay interest unless the vendor is guilty of wilful default; see *Esdaile v. Stephenson* (1822), 1 S. & St. 122, and *Rowley v. Adams* (1850), 12 Beav. 476.

(d) *Where interest is payable if completion is delayed “by any unforeseen or unavoidable obstacle.”*

There are two old authorities of *Monk v. Huskisson* (1827), 4 Russ. 121, and *Birch v. Podmore*, Sug. 635, to the effect that interest is not payable in such a case if the delay is caused by the state of the vendor’s title; but it is thought that these cases would not now be followed, but that the vendor would be held to be entitled to interest in all cases in which it could not be shown that the vendor must have been aware at the date of the contract of the defect in question. In other words, the vendor would only fail to recover interest if guilty of wilful default.

- (e) *Where interest is payable if completion is delayed for any reason other than the vendor's default.*

This case has already been discussed. See p. 132, section (b).

Condition 7 (4).

This paragraph, which gives the vendor the option of taking the rents less outgoing from the date fixed for completion, is most valuable in cases where the net income of the property exceeds the agreed interest. In the absence of such a provision the purchaser may benefit financially by wilfully delaying the purchase beyond the completion date. The right given by this clause is that of taking the net rents "in lieu of the interest otherwise payable under paragraph 1", and it seems clear that if no interest is payable owing to the vendor's default or otherwise, the net rent cannot be retained by the vendor, otherwise the vendor would be taking the net rent "in lieu of" interest which is *not* payable. This option, although normally exercisable (in writing) at any time prior to actual completion, is not exercisable after a deposit of the balance of the purchase price has been made under paragraph 4 of Condition 7. The condition does not require that notice should have been given to the vendor of the deposit in order to destroy his option of taking the rents. It would therefore seem upon a strict interpretation of this paragraph that such option would be lost after the making of such deposit even if the purchaser had failed to give notice thereof to the vendor. It is true that the purchaser would be penalised in such a case by having to pay interest at 5 per cent. per annum up to the date on which notice of the deposit was given to the vendor; but if the writer is correct in his view that the vendor cannot take the net rents unless he is entitled to interest under paragraph 1, then, as the deposit and notice in a proper case under paragraph 2 will prevent that interest from running under paragraph 1, the writer cannot appreciate the necessity or utility of the provision that the option of taking the net rents must be exercised before the deposit is made.

Moreover, if after the deposit is made further delay arises from the purchaser's own act or default, the following position appears to arise:—

- (a) The purchaser must pay in respect of such period of further delay interest at £5 per cent. per annum, less any interest earned by the sum deposited.
- (b) Accordingly, once the deposit has been made (in a proper case) the vendor loses the right to take the net rents even if he is ready to complete within one day after the deposit

is made, but the purchase is delayed for a further period of four weeks owing to the purchaser's wilful default.

If the writer's view is correct it would seem desirable, where a substantial sum is involved, that the vendor's solicitor should substitute for paragraph 4 of Condition 7 the following:—

“(4) The vendor shall, as to any period during which interest at the rate of £5 per cent. per annum is payable under this condition, have the option (to be exercised in writing at any time before actual completion) of taking the rents and profits attributable to such period, or an apportioned part of such rent and profits (as the case requires), less the outgoings or an apportioned part thereof, in lieu of the interest otherwise payable in respect of such period.”

Condition 5 (3) (b) should also be amended by inserting at the commencement thereof the words “Subject as provided in Condition 7 (4).”

(To be continued.)

THE FINANCE ACT, 1936.

III.—Privately Controlled Companies Generally.

IV.—Privately Controlled Holding Companies.

By LEONARD STEIN, Barrister-at-Law.

In an earlier article some account has been given of the main features of section 18 of the new Finance Act, which deals with transfers of assets, and of section 21, which deals with income settled on children. Sections 19 and 20 deal with the levying of surtax on the undistributed income of privately controlled companies, and are designed to tighten up the machinery provided for that purpose by the Acts of 1922, 1927 and 1928.

The effect of sub-section (6) of section 19 is that the provisions both of that section and also of section 20 apply for the purposes of assessment to surtax for 1935/36 and have to this extent a retrospective effect.

The Income Tax Codification Committee observe in their Report that "the statutory enactments regarding the taxation of . . . privately controlled companies are so complicated and obscure . . . that it is not possible to appreciate fully their effect" (a). As will be seen from what follows, the Finance Act, 1936, still further complicates this confusing mass of legislation.

Sections 19 and 20, though in some respects breaking fresh ground, have not the startling novelty of section 18 (transfer of assets), nor do they affect as large a class of taxpayers as section 21 (income settled on children). Hence, instead of discussing sections 19 and 20 in detail, it is thought that for the purposes of this article it will be more useful to give a general account of their contents, supplemented by comments on certain points of special difficulty or interest.

III.—SECTION 19: PRIVATELY CONTROLLED COMPANIES GENERALLY.

The main features of section 19 may be summarised as follows:—

- (1) The effect of the first part of section 21 (6) of the Finance

(a) Cmd. 5131 (1936), para. 25, p. 18.

Act, 1922, as amended by section 31 (3) of the 1927 Act, is that a company which is neither a company in which the public are substantially interested, nor a subsidiary of a company to which the companies surtax legislation is inapplicable, will be within the scope of that legislation if it is "under the control of not more than five persons". The latter part of section 21 (6), as it stood before the 1936 Act became law, was concerned with the tests to be applied in determining whether a company was, for companies surtax purposes, under the control of not more than five persons. In *Himley Estates, etc. v. C. I. R.* (b) this part of section 21 (6) was the subject of unflattering comment by Mr. Justice Rowlatt, who observed that "this important clause ought not to be allowed to remain in this unscholarly and bewildering form". The latter part of section 21 (6) is now repealed by section 35 (7) (read together with the Fourth Schedule) of the 1936 Act, and the tests of control by not more than five persons are propounded *de novo*, and in stringent terms, in sub-sections (1) and (2) of section 19.

Sub-section (1) deals with the question—What is control? Sub-section (2) deals with the question—In what cases is a group of two or more persons to be treated, for the purpose of testing control, as a single person? Though section 19 contains, as will be seen, other important provisions, sub-sections (1) and (2) are of paramount interest, since it is only where a company is under the control of not more than five persons that the question of applying the companies' surtax legislation can arise.

Sub-sections (1) and (2) cannot safely be paraphrased or summarised and must, therefore, be reproduced:—

Sub-section (1).

"(1) For the purposes of subsection (6) of section twenty-one of the Finance Act, 1922, a company shall be deemed to be under the control of not more than five persons—

- (a) if any five or fewer persons together exercise, or are able to exercise, or are entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing words, if any five or fewer persons together possess, or are entitled to acquire, the greater part of the share capital or voting power of the company; or
- (b) if any five or fewer persons together possess, or are entitled to acquire, either the greater part of the issued share capital of the company, or such part of that capital as

would, if the whole of the income of the company were in fact distributed to the members entitle them to receive the greater part of the amount so distributed; or

- (c) if, on the assumption that the company is a company to which the said section twenty-one applies, more than half of its income (including any income which has been apportioned to it, or could on that assumption be apportioned to it, under the said section twenty-one) could be apportioned among not more than five persons."

Sub-section (2).

"(2) In determining for the purposes of the said subsection (6) whether a company is or is not under the control of not more than five persons, persons who are relatives of one another, persons who are nominees of any other person together with that other person, persons in partnership, and persons interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person, shall respectively be treated as a single person.

For the purposes of this subsection—

- (a) the expression "relative" means a husband, wife, ancestor, lineal descendant, brother or sister;
- (b) a person shall be deemed to be the nominee of another person, if, whether directly or indirectly, he possesses on behalf of that other person, or may be required to exercise on the direction of or on behalf of that other person, any right or power which, by virtue of any of the provisions of this Act, is material in determining whether a company is or is not to be deemed to be under the control of not more than five persons."

On sub-section (1) of section 19 a question arises as to the meaning of the words "control over the company's affairs". The words "in particular but without prejudice to the generality of the foregoing words", which introduce the reference to share capital and voting-power, show that the control referred to is not necessarily shareholders' control. The words "control over the company's affairs", in so far as they do not relate to shareholders' control, would seem at first sight to point to directors' control. In *De Beers Consolidated Mines, Ltd. v. Howe* (c), where the question was that of determining whether the company was resident in the United Kingdom for the purposes of liability to tax under Case I of

Schedule D, Lord Loreburn, L.C., after observing that "the real business is carried on where the central management and control actually abides", proceeded to point out that "the directors' meetings in London are the meetings where the real control is always exercised". It does not necessarily follow that, for the purposes of section 19 (1) of the 1936 Act, "control over the company's affairs" is to be considered to be exercisable by the directors, but it is not clear that this construction is excluded, difficult though it is to suppose that a company may be caught by reason only of the fact that its Board is so constituted that the conduct of its affairs is in the hands of not more than five directors. It will be observed that on this view of sub-section (1) the absurd result would seem to follow that the Board would have to consist of at least ten members, since otherwise any five directors could be said to be "together able to exercise control over the company's affairs".

It is not required that the five or fewer persons shall be persons who do in fact exercise control; it is enough that they are "able" to do so. That "able" does not mean "entitled" is suggested by the distinction between "able to exercise" and "entitled to acquire". Further, the "control" which the five or fewer persons are "able" to exercise may be either "direct" or "indirect". This vague and elastic language has the advantage from the standpoint of the Revenue, and the disadvantage from that of the taxpayer, of creating the maximum of uncertainty as to the tests to be applied in deciding whether any given arrangements will or will not bring a company within the scope of the companies' surtax legislation.

It will be observed that under all three paragraphs of sub-section (1) control can be deemed to exist by reference to tests relating solely to the ownership of the company's capital or to the right of participation in its profits, irrespective of control in any of the ordinary senses of the term, and, in particular, without reference to voting-power.

A question may arise under sub-section (1) with regard to the word "together", which seems to connote the coupling together of at least two persons. Let it be supposed that two brothers, A and B, acting together, are able, within the wide meaning of sub-section (1) to "exercise . . . control . . . over the company's affairs". The effect of the definition of "relative" in sub-section (2) (a) is that A and B must be treated as a single person. If, then, it were sought to rely upon sub-section (1) (a) for the purpose of bringing the company within the scope of the companies' surtax legislation, it is not clear that the words "any five or fewer persons together . . . are able to exercise . . . control", strictly

construed, would cover a case in which the persons able to exercise control were required to be treated as one person. The same point might arise with regard to the application of paragraphs (b) and (c) of sub-section (1).

While sub-section (1) is concerned with the expression "control", sub-section (2) is concerned with the expression "not more than five persons", its effect being to require that certain groups of persons shall be treated as equivalent to one person.

Among these groups is that consisting of "persons who are nominees of any other person together with that other person". It will be seen that by paragraph (b) of the sub-section the word "nominee" is given a very wide meaning, and a meaning made all the more elastic by the use of the vague words "directly or indirectly".

If the words "persons who are nominees of any other person together with that other person" are strictly construed, their effect would seem to be that if X and Y are nominees of Z, then X, Y and Z are together to count as one person. Though there is no doubt as to the intended effect of the sub-section, its language does not appear clearly to provide that if X is a nominee of Y, X and Y are to be treated as one person.

(2) The companies' surtax legislation has hitherto applied only to companies within the meaning of the Companies Acts (see the first part of section 21 (6) of the 1922 Act, as amended by section 31 (3) of the 1927 Act). The way was thus open for attempts to circumvent the legislation by employing the machinery of bodies corporate other than companies, as, for example, Industrial and Provident Societies. The 1936 Act seeks to close this gap. The effect of section 19 (3) is that, for the purposes of the companies' surtax legislation, the word "company" will now be taken to include "any body incorporated in . . . the United Kingdom under any enactment", *i.e.*, whether under the Companies Act or not.

(3) For the purpose of determining whether the companies' surtax legislation is applicable in any particular case, the crucial question is whether, within a reasonable time after the end of a given accounting period, the company had distributed a reasonable part of its actual income for that period. In deciding that question, the Commissioners are to have regard to the current requirements of the company's business and, further, to the provision which it may be necessary or advisable to make for the maintenance and development of that business. It is, however, expressly provided that payments made, or intended to be made, out of the company's income for certain specified purposes shall be regarded as income available for distribution among the members (see 1922 Act, sec-

tion 21 (1), as amended by 1927 Act, section 31 (1)). To these specified purposes section 19 (4) of the 1936 Act adds the redemption or repayment of any share or loan capital or debt (including any premium thereon) issued or incurred "otherwise than for adequate consideration". The consideration will be other than adequate consideration if its value to the company is "substantially less" than the amount of the share or loan capital or debt, including any premium thereon. It is to be observed that what has to be considered is not the intrinsic value of the consideration, but its value to the company. The words "*substantially less*" are another of those vague and elastic expressions which are favoured by the 1936 Act, though in this case an analogy can be found in the words "substantial benefit" as used, with reference to stamp duty on voluntary transfers, in section 74 (5) of the Finance (1909-10) Act, 1910.

The effect of section 19 (4) can be seen from a simple illustration. Let it be supposed that, for the purpose of avoiding tax, A has transferred property to a company controlled by himself for a consideration paid in preference shares redeemable at a premium. The shares plus the premium represent an amount largely exceeding the value of the property. A's object is to receive the excess, representing income to arise from the property, in the form of capital, thus escaping surtax. Section 19 (4) of the 1936 Act is designed to defeat any such scheme. When the question arises whether the company has distributed a reasonable part of its income, any income paid, or intended to be paid, to A in redemption of his preference shares will fall to be treated as income available for distribution. If, on this footing, it is decided that the company has not distributed a reasonable part of its income for the accounting period in question, the whole of that income, including any part of it paid to A in redemption of his preference shares, will for tax purposes be apportionable among the members and will thus, to the extent of A's interest in the company, form part of his total income.

Preference shares redeemable at a premium have been mentioned by way of illustration, but the effect of section 19 (4) would be precisely the same if A were a debenture-holder or, indeed, if he were merely an unsecured creditor.

(4) Section 21 (3) of the 1922 Act, read together with section 31 (5) of the 1927 Act (which relates to companies in liquidation), provides that a notice of charge to surtax under the companies' surtax legislation shall in the first instance be served on the member of the company on whom the tax is assessed. If within twenty-eight days the member does not elect to pay the tax,

a notice of charge is to be served on the company (or, where it is in liquidation, on the liquidator), and the tax thereupon becomes payable by the company; in the case of a company in liquidation the liquidator is liable for the due payment of any surtax payable by the company.

Thus, before the coming into force of the 1936 Act, the position was that if the member did not elect to pay, the Crown could look only to the company. Sub-section (5) of section 19 of the new Act is designed to remedy this weakness by providing that where a company, having been served with a notice of charge, has not paid the tax within the time limited by the sub-section, the tax shall, without prejudice to the right to recover it from the company, be recoverable from the member on whom it was assessed. The right to recover the tax from the member will arise on the company's failure to pay before the expiration of three months from the date on which the notice of charge was served upon the company or before January 2 following the end of the year of assessment, whichever of these periods is the longer.

IV.—SECTION 20: PRIVATELY CONTROLLED HOLDING COMPANIES.

While section 19 strengthens the machinery of the Income Tax Acts for dealing with the undistributed income of privately controlled companies generally, section 20 is specially designed to check avoidance of tax through the medium of a particular class of privately controlled companies, *viz.* "investment companies", or, in other words, holding companies. Among other devices at which section 20 is aimed, one which may be particularly mentioned is that of putting a holding company into liquidation and keeping it in liquidation for an indefinite period, dividends paid by the operating company or companies being received by the holding company as assets in the winding-up and distributed as capital to its shareholders, who thus, in effect, receive dividends free of liability to surtax.

The main provisions of section 20 may be summarised as follows:—

(1) Sub-section (1) is concerned with the definition of an "investment company". A company will be an "investment company" if it is a company "the income whereof consists mainly of investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in sub-section (3) of section 14 of the Income Tax Act, 1918".

This rather loose definition may well give rise to difficulties.

In the words "the income whereof consists" it is not clear what is to be understood by "the income". Are the sources of the company's income to be looked at generally over the whole period of its existence, or is the income of each year or other period for which accounts are made up to be considered separately? Cases can be imagined in which the distinction might be material.

The test is whether "the income" consists "mainly" of investment income. In section 19 (1) (a) and (b) the expression used is "the greater part", and in section 19 (1) (c), and also in section 20 (3) and (4), the expression used is "more than one-half". "Mainly" evidently connotes something different from "the greater part" or "more than one-half", for, if not, one of these formulæ would presumably have been used. But while a proportion of fifty-one per cent. will, it would seem, not satisfy the word "mainly", little more can be said as to how that word is to be understood. The confusion is increased by the reference in section 33 (1) of the Income Tax Act, 1918, to a company "the *principal* part of whose income is derived therefrom (*i.e.*, from investments)". It would thus appear to be necessary to distinguish "main" from "principal", since, if the effect had been intended to be the same, it would have been easy to use in section 20 (1) of the 1936 Act an adaptation of the ready-made formula to be found in section 33 (1) of the Income Tax Act, 1918—*e.g.*, "the principal part of whose income consists of investment income, that is to say", etc.

(2) If a company is, within the meaning of section 20 (1), an "investment company", it will be subject to specially rigorous treatment in the application of the companies' surtax legislation. In order to understand how it will be affected, it is necessary to consider what is meant in section 20 by a "loan creditor", since the "loan creditor" plays an important part in the scheme of the section.

He is defined as follows in sub-section (7), which must be reproduced in full, since it cannot be satisfactorily summarised:—

Sub-section (7).

"(7) For the purpose of this section, the expression "loan creditor" means a creditor in respect of any debt incurred by the company—

- (a) for any money borrowed or capital assets acquired by the company; or
- (b) for any right to receive income created in favour of the company; or

- (c) for consideration the value of which to the company was (at the time when the debt was incurred) substantially less than the amount of the debt (including any premium thereon)

or in respect of any redeemable loan capital issued by the company:

Provided that a person carrying on the business of banking shall not be deemed to be a loan creditor in respect of any loan capital or debt issued or incurred by the company for money lent by him to the company in the ordinary course of that business.

It will be noticed that in paragraph (c) we meet once more the vague expression "substantially less", which has already been used in section 19 (4) (A). But a creditor may be a "loan creditor" for other reasons than the inadequacy of the consideration for the debt. The whole definition is, indeed, subject to the proviso that a person carrying on the business of banking is not to be deemed to be a "loan creditor" in respect of any loan capital or debt issued or incurred by the company for money lent by him to the company in the ordinary course of his banking business. But subject to this, if the debt has been incurred for any money borrowed or "capital assets" acquired by the company, the creditor will in respect of such debt be a "loan creditor". He will also be a "loan creditor" if the debt has been incurred in consideration of his binding himself to provide the company with income, as, for example, in the form of annual payments. Lastly, irrespective both of the nature and the adequacy of the consideration, the mere fact that a creditor is a creditor in respect of any redeemable loan capital issued by the company will of itself be enough to make him a "loan creditor".

(3) If a company is an "investment company" having "loan creditors", the effect of section 20 (2) will be that the income of the company available for distribution among its members will, for the purposes of the companies' surtax legislation, be deemed to include any sum expended, or *available* to be expended, out of its income, in or towards the redemption, repayment or discharge of any loan capital or debt (including any premium thereon) in respect of which any person is a "loan creditor" of the company. In other words, an "investment company's" payments or obligations to its "loan creditors" will be totally disregarded in determining whether it has distributed a reasonable part of its income. All income used, or available to be used, by the company for paying off its "loan creditors" will be treated as income which it could have distributed among its members by way of dividend.

(4) Section 20 (3) introduces a new test which in the case, but only in the case, of an "investment company" is to be applicable for the purpose of determining whether a company is "under the control of not more than five persons". An "investment company" will be deemed to be under such control if any five or fewer persons would, if the company were wound up, be entitled, either as members or "loan creditors" of the company, to receive more than half the assets which would be available for distribution to members and "loan creditors".

It will be seen that in the case of an "investment company", though not in any other case, "control" may be determined by reference to the distribution of assets in a hypothetical winding-up, and that the persons whose claims in a winding-up are to be taken into account for the purpose of fixing "control" include "loan creditors" as well as members.

A direction under the companies' surtax legislation must be made in respect of the income of some particular year or other period for which the accounts of the company have been made up. It is not clear whether the close of the accounting period in question is the date at which the hypothetical winding-up is to be supposed to take place, or, if not, what other date is to be taken.

(5) The importance of the "loan creditors" in the scheme of section 20 is further brought out by sub-section (4). It has been seen that an "investment company" is to be deemed to be under the control of not more than five persons if, in a winding-up, any five or fewer persons would, as members or "loan creditors", be entitled to receive more than half the assets which would be available for members and "loan creditors". The effect of sub-section (4) is that if there are any five or fewer persons who would in a winding-up, be entitled as "*loan creditors*" to more than half the above-mentioned assets, then, for the purpose of apportioning the income of the company among the members under the companies' surtax legislation, all "loan creditors" are to be deemed to be members of the company. As to the determination of a "loan creditor's" interest for the purpose of apportioning the company's income, sub-section 4 (b) provides that his interest shall be determined by reference to the extent to which the income has been or is available to be applied towards the extinction of the loan capital or debt in respect of which he is a "loan creditor".

Sub-section 4 is qualified by provisos designed to ensure that if and in so far as a "loan creditor" is a cloak for some other person, that other person shall be substituted for him as the person to be deemed, as a "loan creditor", to be a member of the company.

(6) A further innovation applying exclusively to "investment companies" is introduced by sub-section (6), which deals with income arising to an investment company after it has gone into liquidation.

Income which *arises* to a company before the date of a winding-up order or resolution, but remains undistributed at that date, is brought into the net of the companies surtax legislation by section 31 of the 1927 Act. But the companies' surtax legislation has hitherto had no application to income arising to a company *after* it has gone into liquidation. In the case of an "investment company", section 20 (6) of the 1936 Act now provides that where the company has gone into liquidation, any income arising to it *after* the date of the winding-up order or resolution *shall* (not "may") be deemed to be income of the members. There is, and in the nature of the case there can be, no question of a decision as to whether the company has distributed a reasonable part of its income by way of dividend; since it is in liquidation, the question of dividends does not arise. Section 20 (6) simply provides that income arising to an "investment company" while it is in liquidation *shall*, without more, be treated as income of its members, which expression will (as has been seen) be deemed, in certain circumstances, to include "loan creditors".

It is to be observed that sub-section (6) applies to *all* "investment companies" in liquidation, irrespective of whether the winding-up order was made, or the winding-up resolution passed, before or after the coming into force of the new Act.

STAMP DUTY ON DEEDS OF DISSOLUTION OF PARTNERSHIP.

By R. GRAHAM PAGE, LL.B., Solicitor.

“The Stamp Law . . . imports nothing of principle or of reason, but depends entirely upon the language of the Legislature.” So said Mr. Justice Taunton in *Morley v. Hall* (1834), 2 Dowl. 494, and, therefore, in dealing with any matter relating to the stamping of documents, a careful study of “The Charter of the Controller of Stamps” (*viz.* the Stamp Act, 1891) is not only valuable but unavoidable. At the same time, however, there is a judicially recognised principle that an instrument must be stamped according to its tenour and not its designation, its effect and not its description, its substance and not its form, its spirit and not its name. For that reason, many matters of stamp law involve not only an appreciation of “the plain and ordinary meaning of the words used [in the Statute] as it appears from the words themselves” (*per* Lord Esher, M.R., in *Commissioners v. Angus & Co., Ltd.* (1889), 23 Q. B. D. 579), but a knowledge of deep and delicate points of substantive law. This is certainly so in considering the correct stamp duty for instruments relating to partnership transactions between the partners *inter se*.

No very great difficulty arises as regards stamp duty upon the instrument initiating the partnership. The rule is well known and simple, namely, that, if any premium is payable by an incoming partner, *ad valorem* conveyance duty is payable upon the amount of that premium. For example, if A and B are entering into partnership in a business formerly carried on by A alone, and B is paying to A, say, £300 for being permitted to join with A in the business, then the partnership articles should be stamped £1 10s. (provided the usual certificate as to value is included). No duty is, however, payable upon money brought into the partnership as capital. If, to take the example already given, B’s £300 is to form part of the capital of the business, that is to say, A brings the goodwill of the business into the partnership and B brings £300 capital, then the partnership articles need be stamped only with the fixed duty for a deed or agreement, *i.e.* the 10s.

deed stamp or the 6d. agreement-under-hand stamp, whichever may be appropriate. In brief, stamp for premium, no stamp for capital.

But there is no similar straightforward statement applicable to stamp duty problems arising upon the determination of a partnership, and in order to understand the position fully it is necessary to start at the elementary beginning, which is section 1 of the Stamp Act, 1891. That section, in its picturesque language, states that "the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the First Schedule to this Act shall be the several duties in the said Schedule specified". Turning to "the said Schedule", one finds mention of "Conveyance or Transfer on Sale", which expression includes, since the Finance Act, 1910, s. 74, any voluntary disposition "of any property" except certain Bank of England and Government stock previously mentioned in that Schedule. Then follow the duties payable in accordance with an *ad valorem* scale, which was doubled by section 73 of the Finance Act, 1910. There is another heading in the "said Schedule" which is of importance in considering dissolution deeds. It is the heading "Release or Renunciation of any Property or of any Right or Interest in any Property" and the duty chargeable under this heading varies with the nature of the transaction. If the "Release or Renunciation, etc.," occurs upon a sale, it is subject to the same rules and chargeable with the same duty as a conveyance on sale, *i.e.* *ad valorem* conveyance duty. If the "Release or Renunciation" is made by way of security, it is treated for stamp duty purposes as a mortgage. In any other case, the "Release or Renunciation" attracts only the fixed duty of 10s. A "Release or Renunciation" occurring upon a sale is the case relevant to a consideration of dissolution deeds and, as such "Release or Renunciation" is treated as a "Conveyance on Sale", there is no need to deal with it separately here.

It is under those general words, "Conveyance or Transfer", that the Controller of Stamps collects from every continuing partner his duties, and it is of little avail to refer the learned Controller and his subordinates to the words of Lord Esher in *Commissioners v. Angus (ante)*, that "when the Legislature assume to impose a tax on the subject, they must do so in clear and distinct terms" and, "if the matter remains in doubt, the subject is entitled to judgment". One would be referred to the clear and distinct terms of section 54 of the Stamp Act, 1891: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument" (whether under hand or seal) "and every

decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction." Then again there is section 59 (1) of the same Act: "Any contract or agreement" (here follow certain words repealed by the Revenue Act, 1909) "for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

To diverge slightly from the pursuit of the answers to questions dealing mainly with the dissolution of partnerships and the stamp duties attracted by dissolution instruments, it might be remarked here that the remaining sub-sections of section 59, of which the first sub-section has just been quoted, are known little and understood less by practitioners. Many practitioners have but an undefined idea in the back recesses of their minds that there is something in the Stamp Act about stamping agreements which do not materialise into conveyances, as if they were conveyances, but few practitioners are aware, until they are obliged to "look it up", that this provision (by reason of the exception of lands, goods, wares, merchandise, stock, marketable securities and ships) applies only to property such as patents, book-debts, goodwill, benefit of contracts, cash on deposit and tenants' or trade fixtures attached to leaseholds; that, even though the contract or agreement be not stamped *ad valorem*, but only with the fixed duty of 10s. or 6d., as the case may be, it is "duly stamped" for the purpose of proceedings for specific performance or damages thereon; that a conveyance made in conformity with a contract or agreement, stamped with the fixed duty only, may be duly stamped *ad valorem* if presented within six months of the contract or agreement; that a conveyance following upon a contract or agreement, stamped *ad valorem*, should be stamped only 10s., but should also be denoted; and that, if a contract or agreement, stamped *ad valorem*, be rescinded or annulled, the duty paid will be returned.

The provision that such a contract or agreement is "duly stamped" for the purpose of proceedings for specific performance

or damages thereon is useful in an assignment of goodwill. In the case of *Commissioners v. Angus* (*supra*) the parties entered into an agreement to sell and purchase respectively the goodwill of a certain business. The parties did not intend to complete the agreement by a formal conveyance or assignment of the goodwill. It was argued on behalf of the Commissioners that the agreement had effected a conveyance of an equitable interest and ought accordingly to be stamped *ad valorem* as a conveyance on sale. It was held, however, that an agreement to sell is not a conveyance on sale, even though, in the case of goodwill, such an agreement gives the purchaser all that he requires. The result is that upon the sale of a business consisting of, say, land, stock and goodwill, the purchase-money may be apportioned between the three items and *ad valorem* stamp duty paid only in respect of the land, that being the only item in respect of which an instrument of conveyance is required. The stock may be transferred by delivery and the goodwill may be left subject merely to an agreement to sell, which agreement could be enforced by proceedings for specific performance. There may be cases in which it is not safe to disregard a proper assignment of the goodwill, but in many cases of the sale of a business the purchaser has all the powers he requires for the protection of the goodwill of the business by having an agreement which can be specifically enforced should occasion arise.

As was stressed in the judgments in *Angus's Case* (*supra*), it is the instrument which is "struck at" by the Stamp Acts and not the transaction. If the transaction can be carried out without an instrument which attracts duty, then the duty is evaded, "and if there be a means of evading the stamp duty, so much the better for those who can evade it" (*per* Lord Esher, M.R., in the same case).

Following the decision in *Angus's Case* (*supra*), there seems to be no good reason why such part of the purchase-money paid by a continuing partner for the share of a retiring partner in the partnership as is paid for goodwill should not be disregarded entirely in the dissolution deed. If, on a sale of a business to a person not a member of the firm carrying on the business, the purchase-money may be apportioned, the part paid for goodwill be left out of the conveyance or assignment of the other business assets, the transfer of the goodwill be left in a suspended state in reliance on the agreement to sell and stamp duty be evaded on that part of the purchase-money attributable to goodwill, then, there seems to be no reason why such a course should not be adopted in the case of a sale to a continuing partner, unless it

be that the declaration of the dissolution does itself affect a transfer of the retiring partner's share in the goodwill. Having regard to the effect of the declaration of dissolution upon chattels ordinarily transferable by delivery (a point which is discussed hereafter), it might be argued that the declaration completes the transfer of the share in the goodwill and, if the purchase-money paid for that share is not stated in the deed, then the consideration for the conveyance effectuated by the deed is not truly stated. It is submitted, however, that such an argument would not be sound, unless, according to the ordinary interpretation of written documents, the deed of dissolution could be construed as effectuating a transfer of the goodwill.

However, returning to a broad consideration of matters of dissolution of partnership, if the words of the relevant sections of the Stamp Act, 1891, are not sufficient to convince the subject, then the decisions in *Potter v. Commissioners* (1854), 10 Ex. 147, and *Christie v. Commissioners* (1866), L. R. 2 Ex. 46, put it beyond doubt that an assignment of a share in the assets of a partnership upon a dissolution is a "conveyance on sale", and *ad valorem* duty must be paid upon the consideration for such assignment. In *Potter's Case* there was a dissolution of a partnership in a papermaker's business and the retiring partner was paid a sum of money by the continuing partner for his (the retiring partner's) share of the goodwill. The arguments and the judgment in the case were directed to the issue of whether goodwill was property which could be sold and which could be the subject of "a conveyance on sale" and so become liable to *ad valorem* conveyance duty. Reference was made to the case of *Belcher v. Brymer*, 5 L. J. K. B. 93, in which one partner assigned to the other partner all his interest in a certain contract and in all debts due to the partnership, and it was stated that his share in the partnership should be deemed to be worth £50,000, of which £30,000 had been paid. Upon those facts it was held that the transaction was not a conveyance on sale. Chief Baron Pollock, however, in *Potter's Case* pointed out that the decision in *Belcher v. Brymer* had been based on the authority of *Warren v. Howe*, 2 L. J. K. B. 8, in which it was held that the assignment of a judgment debt was not an assignment of property and therefore not a conveyance on sale attracting *ad valorem* conveyance duty; and Chief Baron Pollock further pointed out that the case of *Warren v. Howe* had been, in effect, overruled by the case of *Caldwell v. Dawson*, 5 Exch. Rep. 1; he, therefore, felt himself free to disregard the case of *Belcher v. Brymer* and to hold that goodwill was property which could be sold, and that in *Potter's Case* there

had been a "conveyance on sale" which attracted *ad valorem* conveyance duty. The Court does not appear to have been asked to consider whether, as between partners, there could be a "sale" of goodwill, perhaps because it was evident on the facts that the parties had made an express bargain and sale and had thereby precluded themselves from contending that the transaction was anything but a sale, if goodwill was a type of property which could be the subject of a sale.

In *Christie's Case* (*supra*), however, the point was directly raised as to whether one partner could *sell* (*i.e.* grant a conveyance on sale) to another partner the former's share in the partnership. The facts were, briefly, that Messrs. Back and Christie were partners in the concern of brewers and wine merchants. Mr. Back desired to retire and Mr. Christie desired to carry on the whole business. The accounts showed that Mr. Back's share in the partnership was worth £110,000. The dissolution deed provided for the payment by Mr. Christie to Mr. Back of £10,000 in cash, the remaining £100,000 being secured by a mortgage by Mr. Christie to Mr. Back of certain of the assets of the firm and by an assignment of certain policies of insurance. The deed contained the usual releases and indemnities and an assignment of the assets of the firm to Mr. Christie. The Commissioners were of opinion that the deed was a "conveyance on sale" and attracted *ad valorem* conveyance duty. Mr. Christie required a case to be stated and, upon the hearing, his counsel (Mr. Joshua Williams, Q.C.), put forward the ingenious argument that the contract of partnership involves an implied stipulation that the property belonging to the partners shall be sold and divided upon a dissolution; that each partner has a right to have the property realised and to be paid his share; and that when a retiring partner on receiving that share executes a deed assigning his interest to his co-partner, there is nothing *sold* by him in the ordinary acceptance of the word. But Chief Baron Kelly rejected this argument, saying: "The substance of this transaction . . . seems to me to be a sale by Mr. Back to Mr. Christie of Mr. Back's interest in the partnership property for the sum of £110,000. I can see no distinction, with respect to liability to stamp duty, between a sale on the part of Mr. Back to Mr. Christie, who happened to be the continuing partner, and a sale by Mr. Back to any other person with whom Mr. Christie might have been disposed to enter into partnership, and to whom Mr. Back might have been willing, for a certain consideration, to assign and convey the whole of his interest in the partnership property. . . . The conveyance is made to the continuing partner, but, whether made to him or to any other person, it is for all

purposes a sale of the property in question in consideration of the price or purchase-money of £110,000."

Counsel had argued that the transaction between Mr. Christie and Mr. Back was similar to the case of a partition, but Chief Baron Kelly pointed to the clear distinction in the following words: "Now, a partition is totally unlike a sale and purchase of a landed estate. . . . Persons who have an interest in property held . . . in any . . . joint manner or character, are very frequently content to take something far less in value than the interest which they possess in the common property, in order that what they are possessed of they may possess in severalty, independently of all other persons; and where persons come to such an arrangement, whether they agree at once to divide the property into equal portions, or whether one is to pay a sum of money to the other or to all the others, the sum which is paid is not paid as the price or purchase-money of the property which he who pays it takes under the partition. There the real consideration, looking to the substance of the transaction, is the partition itself, and the power which the party in question takes to hold the property in severalty, and independently of those who had theretofore been his fellow-holders."

This distinction between, on the one hand, a dissolution of a partnership by the sale of the retiring partner's share and, on the other hand, a partition of property held jointly is of considerable importance. The provisions of the Stamp Act, 1891, recognise the distinguishing characteristics of a partition and deal separately with the case of a partition. If the Court in *Christie's Case* (*ante*) had held that the dissolution deed in that case was, in substance, a partition and not a conveyance on sale, it would have relieved the subject of much liability to stamp duty and the Commissioners of much revenue, for section 73 of the Stamp Act, 1891, provides that: "Where . . . upon the partition or division of any real or heritable property, any consideration exceeding in amount or value £100 is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby the . . . partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for the consideration, and with that duty only." It was held in *Henniker v. Henniker* (1852), 22 L. J. Q. B. 94, that a partition is not a sale, and, accordingly, all those provisions relating to a conveyance on sale do not apply to a partition. Only the consideration given for equality attracts stamp duty.

Section 73, therefore, offers a simple and sound solution in many cases to a number of the stamping difficulties which arise

upon a dissolution of a partnership and which are discussed hereafter. If it is possible to dissolve a partnership by a division of the partnership assets rather than by "buying out" a retiring partner, such a course should be adopted, for it will bring with it a saving in stamp duties, and, as has been stated, Lord Esher gave his blessing in *Angus's Case (supra)* to the subject who could discover a way of carrying out a transaction without incurring liability to stamp duty. It is tentatively submitted that the adoption of a partition would be justifiable even in many cases of evident "buying out". For example, suppose that the partnership assets consisted of the following, *viz.*:—

Goodwill	£1,000
Premises	1,000
Stock	500
Book debts	500
Cash on current a/c ...	1,000
Cash on deposit a/c ...	1,000

£5,000

Suppose, too, that the partners, A and B, are entitled in equal shares, that A desires to retire and that B desires to carry on the business himself, and, to that end, desires to purchase A's share. The value of A's share in the partnership assets is £2,500. It would be a gracious gift of £25 to one's country to carry out this transaction by means of a dissolution deed, transferring A's share in all the assets to B in consideration of a payment of £2,500 by B to A.

If the transaction were carried out by a partition deed whereby B takes the goodwill, premises and stock and A takes the book debts and cash, the effect would be a payment by A to B of £2,500 as required, but the deed would escape any duty other than the fixed duty of 10s.

The example given is more simple than the circumstances of most cases would be, but it suffices to show the utility of a partition deed in place of a payment under a dissolution deed, even if some payment of equality money may be necessary. This will be still more evident as we proceed to consider the effect of dissolution deeds upon the transferability of chattels and the consequent liability for duty.

To return now to dissolution deeds themselves, it is clear from what has been said of section 1 of the Stamp Act, 1891, the Schedule to the Act and section 54, that if, under a dissolution deed, a continuing partner pays a sum of money to a retiring

partner, that sum of money is a consideration for a conveyance on sale, and the continuing partner must pay *ad valorem* conveyance duty thereon, as any other purchaser is obliged to pay upon the purchase of property by virtue of a written instrument.

Furthermore, the continuing partner must pay *ad valorem* duty not only upon any payment made by him to a retiring partner, but also upon the amount of the partnership liabilities which he assumes by reason of the dissolution. The authority for this proposition is section 57 of the Act: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty." The section is familiar in connection with the sale of property subject to a mortgage, but the words "whether being or constituting a charge or incumbrance upon the property *or not*", introduced by the Stamp Act, 1870, give to the section a much wider application and have an important effect upon dissolution deeds, making necessary the inclusion of even those partnership liabilities, which are entirely unsecured on the partnership assets, liable to aggregation for the purpose of ascertaining "the consideration in respect whereof the conveyance is chargeable". So, where the share of a retiring partner is assigned to the continuing partner in consideration of an indemnity against liabilities (with or without payment of a sum of money by way of purchase), the proportion of the liabilities from which the retiring partner is relieved—or, from another point of view, the proportion of the liabilities which the continuing partner assumes—must be aggregated with the money (if any) paid for purchase, in order to arrive at the total sum upon which stamp duty is chargeable. To take a simple example: A, B and C are in partnership, sharing profits and losses in the proportions of one-half, one-quarter and one-quarter respectively; A and B retire under a dissolution deed, whereby C indemnifies the retiring partners against the partnership liabilities; the liabilities amount to £4,000; by the indemnity given, C assumes three-quarters of the liabilities and, therefore, duty must be paid on £3,000. If C were also paying to A and B £1,000 each in consideration of the assignment to him of their respective shares, duty would be payable on £5,000.

It might be argued that, since the liability of the debts of the partnership is a joint liability and each partner is liable for

the whole, C (in the example given) is not assuming any further liability than was his already.

The writer endeavoured to raise this contention with the Controller recently, but it acted as a boomerang. The Controller agreed that legally each partner is liable for the whole of the liabilities and pointed out that from this it could be argued that the retiring partner is relieved from the whole of the liabilities, the amount of which would accordingly form part of the dutiable consideration for the purchase of his share. The Controller, however, was fortunately not unscrupulous enough to press home his advantage thus scored and he admitted that in practice the Commissioners regard the amount of the chargeable consideration in this respect as that part of the liabilities corresponding to the retiring partner's fractional interest in the business. The real flaw in the contention that the continuing partner is not assuming any further liability than is his already is that, to take the example already given, C is releasing his right to contribution from A and B, that is, the right which he had against those partners to call upon them to refund to him three-quarters of any sum he might have been obliged to pay in discharge of a partnership liability. He is, in effect, though indirectly, paying to A and B three-quarters of the partnership liabilities and he must meet the stamp duty *ad valorem* of such a payment. It is believed that this would be so, even though C might be able to show that A and B were entirely impecunious and unable to pay any part of the partnership liabilities, and that even before the dissolution he (C) was, not only theoretically, but in fact responsible for the discharge of those liabilities, his right to contribution being worthless. This belief is supported, not only by a ruling which the writer received from the Controller in a recent case to the effect that the ability of the respective partners to discharge the liabilities of the business is a factor which the Commissioners cannot take into account, but also by the case of *Commissioners v. North British Ry.* (1901), 4 Court Sess. Cas., 5th series, 27, in which certain Harbour Commissioners transferred their assets to the railway company, the company undertaking to free and relieve the Harbour Commissioners from all debts; it was held that a debt due from the Harbour Commissioners to the company was part of the consideration in respect of which the transfer was chargeable with *ad valorem* conveyance duty, despite the fact that it was a bad debt.

The consequences of section 57 again show the advisability of a division of the partnership assets *in specie* by means of a partition deed, if such a course is possible, rather than the pay-

ment of money as consideration for a dissolution. In the case of *Macleod v. Commissioners* (1885), 12 Court Sess. Cas., 4th series, 1045, upon a dissolution, the partnership assets were divided *in specie*, one partner taking over all the business assets and the other a mortgage debt owing to the firm, together with a sum of money for equality; it was held that the transaction was not a conveyance on sale, and, therefore, only upon the sum of money paid for equality could stamp duty be charged. Consider the possibilities of the method adopted in *Macleod's Case* if a division of liabilities were made as well as a division of assets. In many cases a considerable saving of duty could be made by the continuing partner taking over part of the assets, say, the business assets, together with part of the liabilities, say, the ordinary trade creditors, while the retiring partner takes over another part of the assets, say, a mortgage debt owing to the firm, together with such special liabilities as can be separated from the business. The transaction would not be a conveyance on sale and would not attract duty as such, but would be a partition and would accordingly attract the duty (if any) to which a partition deed is liable under section 73, already quoted.

It has been said that the continuing partner must pay *ad valorem* conveyance duty on the amount of money paid by him and on the amount of the liabilities assumed by him, both those amounts being dutiable consideration for the transfer to him of the retiring partner's share. But that share will generally include a share in properties which would not, under ordinary circumstances, require any written instrument to complete their effectual transfer, and it is instruments and not transactions that the Stamp Acts attack. In the case of the transfer of a business to some person not a member of the firm carrying on the business, the prudent conveyancer apportions the purchase-money between the property which requires an instrument for its effectual transfer and those chattels which are transferable by delivery. Also, if he is satisfied that there is no necessity for an immediate transfer of the goodwill, he makes a third item in the apportionment—the purchase-money paid in respect of the goodwill. This has already been discussed. He then deals with the transaction in the following manner: He draws the instrument of transfer so that it applies only to that property which requires an instrument for its effectual transfer, *i.e.* land and buildings, reciting that the chattels have been transferred by delivery, but carefully excluding those chattels from being affected by the instrument itself and leaving the goodwill untransferred but secured by the agreement for sale. Under these circumstances, *ad valorem* conveyance duty

is payable only in respect of that part of the purchase-money which is apportioned and attributable to the property transferred by the instrument.

Can the same course be adopted in the dissolution of a partnership? Where a transfer of property is effectuated by a dissolution deed, does the mere fact that the transfer takes place upon the dissolution of a partnership render the dissolution deed chargeable with *ad valorem* conveyance duty in respect of property the transfer of which can be and is effectively made otherwise than by the deed?

It would seem from the judgments already quoted that no distinction can be made between the sale of a business to a partner and the sale of a business to any other person, and accordingly that the purchase-money paid for chattels transferable by delivery may be excluded from the deed and from any liability for duty. As has already been pointed out, it is submitted that such a course might be adopted with regard to the goodwill. If the transaction so far as the chattels transferable by delivery are concerned can be carried out effectively without an instrument, then why should not the duty be evaded?

There is a difficulty, however, in that it is only a share in those chattels which is being transferred, and the further question arises: Can an undivided share in chattels be transferred by delivery? An undivided share in chattels is something rather different from the ownership in the entirety of the chattels. It is, in fact, a *chose* in action and not a simple *chose*. The title to a *chose* in action (unless it come within the limited class of negotiable instruments) is not transferable by mere delivery. Writing is necessary (section 136 of the Law of Property Act, 1925), that is to say, there must be an instrument of transfer—a conveyance on sale. Once this proposition is accepted, there is an instrument upon which the Commissioners can seize and in respect of which the Commissioners can and do demand *ad valorem* conveyance duty.

It is quite evident, of course, that if the deed contains provisions capable of passing the title to the chattels, it will be subjected to stamp duty *ad valorem* of the purchase-money attributable to those chattels, and it is submitted by some (the learned editors of *Alpe on the Law of Stamp Duties*, amongst others,) that the Commissioners can claim duty only in cases where an interest in those chattels passes by the deed. It is believed to be the practice, however, for the Commissioners to insist that conveyance duty is payable on the whole amount of any consideration money paid by a continuing partner to a retiring partner upon a dissolution,

without any deduction in respect of money paid for chattels transferable by delivery, even though the deed contains no assignment of such chattels. The claim is made on the ground that the transaction is substantially a sale of a *chose* in action, and the authority which the Commissioners invariably quote in support of the claim is that of *Garnett v. Commissioners* (1899), 81 L. T. 633.

Garnett v. Commissioners (*ante*) was a case in which J. F. Garnett and J. W. Garnett had for many years carried on business in partnership as cloth merchants, when J. F. gave notice to J. W. that he wished to retire and J. W. gave notice to J. F. that he (J. W.) would purchase J. F.'s share in the partnership. Let us refer to J. F. as R. P., the retiring partner, and J. W. as C. P., the continuing partner. The sum agreed to be paid by C. P. to R. P. upon dissolution was £41,700 odd, and the dissolution was carried out by two instruments: (1) a conveyance of R. P.'s share in the real estate of the partnership for £8,700 odd, and (2) a deed of dissolution whereby, after reciting the amount standing to the credit of R. P. in the partnership accounts, the conveyance of the real estate, that the machinery, implements, plant, utensils, materials, and other stock-in-trade had been taken over or otherwise retained by or were then in the exclusive possession of C. P. and the greater part of the book debts owing to the late firm had been received by C. P. and that the remainder thereof would be received by him as continuing partner, and that C. P. had, previous to the execution thereof, handed to R. P. his promissory note of even date for £41,700 odd, it was declared that the partnership should be considered as determined and should stand dissolved, that R. P. acknowledged that the delivery of the promissory note should be accepted by him in full satisfaction of all claims and demands against C. P. in respect of the share of him (R. P.) in the partnership, and R. P. covenanted that he would not carry on business in the firm name and that he would on request execute such further assurances as might reasonably be required. No dispute arose as regards the stamping of the conveyance of the real property—it was, without doubt, liable to *ad valorem* conveyance duty on the £8,700 odd. As regards the deed of dissolution, however, the Commissioners assessed it liable to duty on £33,000, the difference between the full £41,700 and the £8,700 paid for the real estate. C. P. objected and required the Commissioners to state a case.

The Commissioners' contention was that the deed of dissolution came under either one of two heads in the First Schedule to the Stamp Act, 1891; they contended that it was either a "Convey-

ance or Transfer on Sale" or else a "Release or Renunciation of any Property or of any Right or Interest in any Property"; and that in either case it was chargeable with *ad valorem* conveyance duty. The important point at issue was: "Did the deed of dissolution effect a *sale*, i.e. a transfer of property in consideration of money or money's worth?"

The arguments against the Commissioners' contention were to the effect that the instrument in question neither conveyed nor released anything; that the whole thing had been done before; that the property had passed; that the partnership had been dissolved; that the instrument was something for the mutual satisfaction of the parties, merely recording something which had already been carried out.

Mr. Justice Darling (as he then was) said of these arguments that it was possible that all that was done might have been done without a deed and if the instrument did merely record something which had been done before then it would not attract stamp duty as a conveyance or release under which property passed. He quoted from Lindley (then Master of the Rolls) on Partnership: "If a retiring partner, instead of assigning his interest, takes the amount due to him from the firm and gives a receipt for the money and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want." Then Mr. Justice Darling himself adds: "Well, that might be done without any deed at all; and it is perfectly possible that it might be done; and that a deed might afterwards be drawn up which would not in any way do it but only record it; and in that way such a deed as that might not require an *ad valorem* stamp." He found as a fact, however, that since he had no evidence before him other than the deed—no evidence of anything else happening to transfer the property—that transfer must have taken place when and as the deed was made. "The deed really was that which effectuated the dissolution of the partnership, and the distribution of the partnership effects as the deed recited, and that was done by the deed and not by something else." And he concludes with the words: "What was done . . . was done by the deed, and therefore the deed requires an *ad valorem* stamp."

Mr. Justice Channell in his judgment in the same case begins with a death-dealing blow at the arguments of Mr. Joshua Williams, Q.C., in *Christie's Case* (*ante*). He says: "To begin with, undoubtedly there has been a sale in this case; . . . there has been a sale of the partner's share in the partnership assets." Also, "this is certainly a release and I think it is a release upon a sale within the meaning of the Schedule to the Stamp Act. . . .

I will deal with it upon the footing that . . . it is only such releases upon sales as do pass property which are liable to the *ad valorem* stamp. But how does this release stand? It seems to me to be entirely analogous to, if it is not covered by, the case of *Horsfall v. Hey* (1848), 2 Ex. 778." In the case of *Horsfall v. Hey* there was a memorandum that T. had sold to G. all the goods, stock-in-trade and fixtures and it was held that the memorandum required an *ad valorem* stamp as a conveyance; the headnote to the report adds that "any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act". Mr. Justice Channell, after considerable dissertation upon the use of the past tense operating as if it were the present tense, agrees with Mr. Justice Darling that the instrument in question in *Garnett's Case* effectuated the transfer of the chattels, and he says: "This document would have passed this share provided it had not passed before. Now, it states that it had been passed, and the point is that it had passed eventually by payment, and that the promissory note was equivalent to payment. But the promissory note is given identically with this document, and the whole thing appears to me to be absolutely one transaction. If this argument is good, it seems to me that by paying your money first and executing your deed afterwards you could always get out of the *ad valorem* stamp. That cannot possibly be so. . . . If there is a clearly independent transaction and it is not all part of one transaction, then the thing would stand on a different footing. . . . But where according to the appearance of the deed it is a deed which practically effects a transaction, just as this memorandum in *Horsfall v. Hey* effected the transaction, then it is certainly a 'release upon a sale', within the meaning of the Stamp Act."

It will have been appreciated from these quotations that the decision turned entirely upon the point whether or not the instrument itself effectuated the transfer, in that it said that a transfer *had* occurred.

It was readily acceded that if it did not, in fact, pass the property in the chattels it did not attract *ad valorem* conveyance duty. With the greatest respect to the learned Judges, it seems evident from their judgments that they thought that their decision was a right one but could not at the time of giving judgment discover a really satisfactory reason for the decision. Mr. Justice Darling escaped from true explanation by saying that he had no evidence of the property passing in any other manner than by the deed; Mr. Justice Channell hid behind the headnote to an old case which said that a record of a transfer of property is a

conveyance within the Stamp Act—despite the clear definition in the Act that a conveyance is an instrument whereby any property is transferred. These remarks are in no way derogatory to the learned Judges, for the concluding words of Mr. Justice Channell's judgment recognise the lack of *ratio decidendi*. He says: "On the whole I think there is not very much doubt about the matter, although it is perhaps a little difficult to give the very best possible reasons for the decision which I think must be right."

A careful reading of the case shows that it does not support any contention that *ad valorem* conveyance duty is always chargeable, even when, according to the ordinary rules of construction of written documents, the dissolution deed does not effectuate the transfer. It is submitted that it certainly does not support the contention that *ad valorem* conveyance duty should be charged merely because the deed contains a declaration of dissolution or because the transfer is a transfer of a *chose* in action (an undivided share in chattels) which cannot be effectuated otherwise than by a written instrument. It was said over and over again, in both the judgments in this case, that the property could have passed by delivery. The only question was: "Had it done so, according to the evidence before the Court?"

The true interpretation of the decision in *Garnett's Case* (*ante*) would appear to be as follows: "Where the property in chattels passes by virtue of the deed of dissolution, *ad valorem* conveyance duty must be paid; and, in the absence of strong evidence to the contrary, the property will be deemed to have so passed, even where there is nothing more than a recital in the deed to the effect that it has passed, followed by a declaration that the partnership is dissolved."

It might be thought, then, that the safest course is to omit all mention in the deed of any chattels which are transferable by delivery and to effectuate the transfer by delivery without any record thereof whatsoever. But even so, it is doubted whether the manoeuvre would escape the eagle-eyes of the Controller's subordinates, since the principle which they appear to have deduced from *Garnett's Case* (*ante*) is that a mere declaration of dissolution of partnership effectuates a transfer of the retiring partner's share in the partnership assets of whatever kind they may be. Once insert a provision for dissolution of partnership in a written instrument and you have effectuated a conveyance on sale of all partnership assets. You must then disclose the full purchase price paid therefor, no matter for what it was paid, and you must pay *ad valorem* conveyance duty on that full price.

But despite their pachydermatous attitude in this respect, the

Commissioners would appear to possess a soft heart. One generous allowance is made in practice, although upon what legal principle it rests the writer has never been able to discover.

It will be remembered that *ad valorem* conveyance duty is demanded, not only upon any moneys passing from the continuing partner to the retiring partner, but also upon the amount of liabilities assumed by the continuing partner. It has been said that the Commissioners refuse to acknowledge that a share in partnership chattels can pass by delivery and, whenever there is a deed dissolving a partnership, they require *ad valorem* conveyance duty to be paid upon the moneys paid even for the share in the chattels, the property in which might have passed by delivery, and even where those chattels are not mentioned in the dissolution deed. But it is only upon moneys actually paid for the chattels that such duty is chargeable. As regards the liabilities assumed by the continuing partner, the Commissioners allow those to be set off against the liquid assets of the partnership (*i.e.* stock-in-trade, cash and book debts), and duty is required to be paid in respect only of the retiring partner's share of the excess of the trade liabilities over the liquid assets.

An example is, perhaps, necessary in order to explain this fully. Assume that the trade liabilities of the partnership amount to £1,000, the partnership land is valued at £3,000, and the liquid assets of the partnership amount to £500. A and B are the partners in equal shares and A desires to retire. A's share is to be purchased by B for £1,250 and B is to take over the liabilities (*i.e.* assume to himself A's liability to contribute £500 thereto). In calculating the liability for duty, A's fractional interest in the liquid assets is ascertained (£250) and is deducted from his fractional interest in the liabilities (£500). On the resulting figure (£250), plus the money actually paid (£1,250), *ad valorem* conveyance duty is chargeable—in the example given, on £1,500.

But, to reverse the figures in this example, assume that the liabilities amount to £500, the land £3,000, and the liquid assets £1,000. B agrees to pay £1,750 for A's share and to take over the liabilities. The liquid assets may be set off against the liabilities, but that still leaves £500 worth of liquid assets of which B is acquiring a half-share by virtue of the transaction. Can one say that that half-share should be set off against the £1,750 to be paid, that £250 of that £1,750 has been paid for chattels which are transferable by delivery? The answer, according to the Commissioners, is—No. *Ad valorem* conveyance duty

must be paid on the full £1,750, because the dissolution deed, no matter what it says, effectuates the transfer of the liquid assets.

It is peculiar that the distinction should have been made between liquid assets (including book debts) and non-liquid assets. One would expect the distinction to be made between property which is transferable by delivery and property which is transferable only by a written instrument. One would expect that if the dissolution deed did not mention chattels transferable by delivery and those chattels were purchased, sold and delivered, they would be no concern of the Controller and the money paid therefor or the liabilities assumed as consideration for the purchase thereof would escape duty.

The distinction would appear to be based upon the principle, already mentioned, that a share in partnership chattels is a *chose* in action and is not transferable by delivery and that, if a partnership is dissolved by deed, that deed automatically transfers the *chose* in action and becomes chargeable with *ad valorem* conveyance duty in that respect. But why, then, is an allowance made against liabilities? And if it is made against liabilities and the principle disregarded to that extent, why is the allowance not made against and the principle not disregarded in respect of moneys actually paid?

However, from the practitioner's point of view it is sufficient to know that an allowance is made against trade liabilities, although it would be useful if a client could be found to test by litigation the soundness of the practice of no apportionment of the purchase-money to chattels transferable by delivery. The practice has become so hardened that only an adverse decision of the Courts could break it.

It will be noticed that in the last paragraph the word "trade" appears before the word "liabilities". It should be mentioned that it is only *trade* liabilities in respect of which the concession is made and against which the value of the liquid assets may be set off. In this connection it is interesting to consider the buff-coloured questionnaire that is forwarded by the Controller to those submitting dissolution deeds for stamping. The questions show the meaning of "trade liabilities". The questions are as follows :—

1. In what shares were the partners entitled to the assets and liable for the debts of the partnership?

2. What were the total amount of liabilities of the partnership at the date of dissolution which were secured by a charge to the bank?

3. What was the total amount of trade liabilities of the partnership at the date of dissolution?

4. What was the total amount or value of the liquid assets of the partnership at the date of dissolution?

If it is desired to submit the document for adjudication, attention should be given to a Notice (dated January 1930) which is issued by the Adjudication Department and sets out the nature of the information usually necessary in the case of certain specified classes of instruments. This information is indicated at the end of the Notice and the paragraph relevant to deeds of dissolution of partnership reads as follows :—

“ V.—Instrument of Dissolution of Partnership, whether Agreement or Conveyance.

In all cases . . . Produce a copy of the Balance Sheet or statement of account between the partners, showing—

- (a) The amount of the liabilities (separating Mortgages from current trade liabilities);
- (b) The liquid assets (stock-in-trade, cash and book debts); and
- (c) (If the fact is not disclosed by the instrument) the share of the outgoing partner in the partnership assets.”

One should bear these requisitions in mind in submitting a dissolution deed for stamping, as, by supplying the information when submitting the deed, considerable time and trouble may be saved.

Having considered the results of the declaration in a deed of dissolution of partnership that the partnership is dissolved, namely that such a declaration converts a simple chattel into a *chose* in action, effectuates a transfer of it and accordingly attracts *ad valorem* conveyance duty, it is satisfying to know that the declaration itself does not attract any further duty. The Schedule to the Stamp Act does mention that a declaration of or concerning any property by any writing is liable to a fixed duty of 10s., but once the document has been caught as a conveyance on sale, it would appear to escape the fixed declaration duty.

The practitioner who has considered all the points arising upon the stamping of a dissolution deed will probably have come to the conclusion that it is best to warn the client of the possibility of a heavy liability and then proceed with the matter in the simplest form compatible with his instructions, letting the liability for duty come as it may. But a little preliminary care may save the

client large sums in duty and it is suggested that the care should be directed towards the following points. Can the transaction be carried out by a partition? If so, do it that way. If not, endeavour to settle as many matters as possible before the dissolution deed is executed, by arranging for the retiring partner to take out of the partnership as much of his share as is easily realisable.

NOTES OF RECENT CASES.

1. CONVEYANCING AND PROPERTY CASES.

Perpetuity rule—limitations following limitations void for remoteness.—In *Re Abbott*, [1893] 1 Ch. 54, at p. 57, Stirling, J., following earlier authorities, stated the rule as follows: “It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation.” This rule has been much criticised and disliked, where the subsequent limitation vests within the period, and it is not easy to construe. Two cases, *Re Canning’s Will Trusts*, [1936] Ch. 309; 105 L. J. Ch. 241, and *Re Coleman*, [1936] Ch. 528; 105 L. J. Ch. 244, will therefore be welcomed for the light thrown upon the subject and as being indicative of a tendency to restrict the rule as far as possible.

A simple illustration of the rule may be taken from *Re Backhouse*, [1921] 2 Ch. 51, where there were a series of limitations of interests less than fee simple which were void for remoteness followed by a vested remainder in fee simple, which failed in consequence, as dependent upon the prior invalid limitations. Attention may also be drawn to *Re Hewett*, [1915] 1 Ch. 810, which was strenuously argued and in which Astbury, J., reviewed a number of the principal authorities. In this case under an antenuptial settlement the property was limited in trust (subject to protective trusts) in favour of the husband for life, remainder for wife for life and after the death of the survivor for all the children who should attain twenty-five, but in default of children to attain that age for certain named persons for life, with remainders over. The limitation to the children was void for remoteness, but it was argued that since the gift over for life in favour of the named persons could not take effect outside the rule the gift should be

valid. Astbury, J., held that he must follow the old case of *Re Thatcher's Trusts* (1859), 26 Beav. 365, which had not been dissented from in later cases, and held that the gift over was also invalid.

It should be added here that where the ultimate limitation is not dependent upon but alternative to a limitation void for perpetuity it will not itself be void (see *Re Bowles*, [1905] 1 Ch. 371; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35); nor will the limitation be invalid if it be in default of appointment where there has been an invalid exercise of appointment (*Re Abbott*, [1893] 1 Ch. 54); nor will it be invalid if the gift over is subject to a power of appointment capable of being exercised invalidly but which is not exercised: *Re Davies and Kent's Contract*, *supra*.

In this state of the authorities *Re Canning's Will Trusts* (*supra*) fell to be decided. By his will which took effect in 1916 a testator bequeathed his real estate to trustees for his son W. W. L. for life with remainders over on his issue in strict settlement and in default in favour of the sisters of W. W. L. and their children as he should appoint, and in default of appointment for his sisters successively in tail with remainders over. The testator then bequeathed his residuary personal estate to his trustees upon trust for sale and at their discretion to apply the income in managing, maintaining and keeping up the mansion-house so long as any person entitled to possession was under twenty-one, and subject thereto to stand possessed upon trust as nearly as possible to the trusts therein-before declared concerning the real estate. W. W. L. died a bachelor and without having exercised his power. So far as the realty was concerned this vested in the sisters in tail and one of them barred the entail, thus becoming absolutely entitled. Apart from the proviso relating to income and independently of any question of perpetuity the residuary personalty vested in the sisters absolutely. The difficulty lay in the proviso, since entailed interests could not at that date be created in personalty and it was possible that the income might be employed at periods beyond that permissible by the perpetuity rule. The sisters took their vested absolute interest subject to the provisions relating to income. Farwell, J., held that the true construction of this will was that the testator had intended to make to the beneficiaries a gift of the personal estate and had imposed on that gift a qualification to come into operation in certain events. Therefore, the fact that the qualification was invalid for perpetuity did not affect the gift to the beneficiaries, since this was not a limitation ulterior to and dependent upon a prior limitation void for perpetuity. He supported his reasoning by a reference to *Re Abbott* (*supra*), where

an invalid exercise of a power did not affect the gift in default of appointment, since it was capable of being divested only by a valid appointment.

In *Re Coleman (supra)* Clauson, J., expressed the view that to hold otherwise than as he did would have been inconsistent with the principle in *Re Canning's Will Trusts (supra)*. A testator left a share of his residuary estate to be held in trust for his son W. for life and subject thereto to pay the income during the lifetime of any widow on a discretionary trust for the widow and children of W. and after the death of the widow to be held upon trust for the sons of W. who attained twenty-one and the daughters who attained that age or married under that age. Since the widow was an unascertained person the discretionary trust was invalid for perpetuity: *Re Blew*, [1906] 1 Ch. 624, followed by Clauson, J., in this case. Clauson, J., then held that the ultimate remainder was not invalid because it vested indefeasibly independently of the prior discretionary trust and was therefore in his opinion within the principle of *Re Canning's Will Trusts (supra)*. His view was based upon the fact that the discretionary trust did not affect the vesting of the subsequent limitation nor could it in any event operate to divest it. The rule, which was suggested to the learned Judge, was stated in his words thus (at p. 534): "Any limitation, even of an interest which becomes indefeasibly vested within the perpetuity limits, is void if it falls into possession at the termination of a prior interest, which prior interest is held upon trusts void for remoteness." The learned Judge then denied that in any of the authorities cited had such a rule been stated, and he distinguished *Re Hewett (supra)* and *Re Thatcher (supra)* on the ground that they dealt with a gift which did not vest indefeasibly within the perpetuity limits: see p. 534. The effect of these cases appears to be that where there is a void limitation followed by a gift which under the limitations of the instrument has vested within the limits of the perpetuity rule it will not be invalid provided that it is not dependent or expectant upon the failure of the prior void limitation, that is it will vest indefeasibly and will not be divested by the operation of the limitation found to be void.

Will—"without deduction of income tax"—whether gift free of tax.—By his will a testator directed his trustees to set aside out of his residuary estate such proportion as should provide an income of £1,000 per annum "(without deduction of income tax)" for his wife. The trustees issued a summons for the pur-

pose of ascertaining whether they should set aside a sum sufficient to provide the clear yearly sum of £1,000 after the payment of income tax or such sum as would produce £1,000 gross. It was argued that the direction meant simply that the gross sum of £1,000 was to be paid to the widow without deduction of tax in the first place and not that she was to receive the clear yearly sum of £1,000 after the tax had been paid. Luxmoore, J., held that the direction constituted a liability only to provide the gross sum, but the Court of Appeal unanimously overruled this decision and held that the direction was the equivalent of "free of income tax" in *Re Williams*, [1936] Ch. 509. Romer, L.J., expressed the opinion (at p. 514) that this constituted a duty to set aside at the end of a year from death the amount necessary to produce the net sum free of income tax at the then current rate of income tax, and added: "If the rate of income tax increases after that date so much the worse for the beneficiary."

It is thought that the principle of the decision lay in the fact that some effect must be given to the words "without deduction of income tax" (see *per* Lord Wright, M.R., at p. 513). Consequently it is suggested that this reasoning would be applicable to other words which might have a similar implication without necessarily being identical.

It may be convenient to note here that, where income tax paid at source would be recoverable for the benefit of the testator's residuary estate, the annuitant is under an obligation to complete the form of application. It had been held in *Re Pettit*, [1922] 2 Ch. 765, that if a widow made a claim for repayment of tax which had been overpaid and received payment she held the sum on trust for the testator's estate. Applying this case Bennett, J., in *Re Kingcome*, [1936] Ch. 566, held that an annuitant who had received her annuity free of tax was under an obligation to assist the trustees to recover any tax deducted at source.

Will—contingent legacy—liability for legacy duty.—In *Re Fenwick's Will Trusts*, [1936] Ch. 720, the testator bequeathed the sum of £15,000 free of duty to trustees to pay the whole or part of the income to his adopted daughter and subject thereto to accumulate the income and hold the accumulated income and capital upon trust after his adopted daughter's death upon the trusts therein mentioned. The trustees had since the death paid the income to the adopted daughter and had in fact made a settlement of part of the capital on her marriage. Legacy duty having

been paid out of the income paid to the adopted daughter, this was brought before the Court. Farwell, J., held that the legacy was a contingent legacy to the adopted daughter and that the rule in *Allhusen v. Whittell* (1867), L. R. 4 Eq. 295 did not apply, since Page-Wood, V.-C., had in that case expressly excepted contingent legacies. The learned judge distinguished *Re Perkins*, [1907] 2 Ch. 596, and *Re Poyser*, [1910] 2 Ch. 444, on the ground that those cases dealt with contingent debts and held that the legacy duty was payable out of the corpus of the estate.

Will—direction to accumulate—partial intestacy.—In *Re Thornber*, [1936] Ch. 570 a testator bequeathed certain annuities and subject thereto the income of the estate was directed to be accumulated during the life of his wife or for twenty-one years from his death (whichever was the shorter period) and the capital and accumulations were to be held on trust for his children. He died without having had issue. Bennett, J., held that the direction to accumulate failed, since the persons to be benefited by the direction had never existed. He followed the reasoning of Maugham, J., in *Re Sullivan*, [1930] 1 Ch. 84, in which in somewhat similar events he refused to allow royalties to be treated as capital in accordance with a direction in a will for the benefit of children who did not come into existence. The argument based upon section 49 of the Administration of Estates Act, 1925, that the property in respect of which there is a partial intestacy shall be dealt with under the Act only subject to the provisions of the will is not applicable to those provisions which are inserted for a purpose which fails and should therefore be treated as inoperative.

Will—gift “absolutely” held on trust—attestation by beneficiary.—In *Re Ray’s Will Trusts*, [1936] Ch. 520, a testatrix bequeathed the whole of her property to “the person who, at the time of my death, shall be or shall act as the abbess of the said convent, absolutely”. The will was attested by two nuns of the convent, one of whom at the death of the testatrix had become abbess of the convent. Clauson, J., held first that the bequest was a gift to the person who should become abbess upon trust for the community without any fetter on the employment of capital and income for that purpose. He held that the word “absolutely” did not confer a beneficial interest free from any trust, but merely

indicated that she was to use it in her discretion without any obligation to keep the fund intact. It will be observed that in this case there were no words directly importing a trust, such as the "precatory words" found in the older cases in which the use of the word "absolutely" has given trouble. The existence of the trust appears to have been deduced primarily from the character of the legatee, who was not even an ascertained person at the date of the will: cf. *Re Barclay*, [1929] 2 Ch. 173. It is suggested that this case should not be regarded as an authority for construing the word "absolutely" where the gift is made to an ascertained person without additional "precatory" words of trust.

Clauson, J., then held that attestation by the nuns did not invalidate the gift. In so far as the one became abbess this was immaterial; attestation by a trustee does not invalidate a gift: *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69. It was discussed in argument whether the fact that the legatee was not ascertained at the date of attestation would have prevented the gift failing in any event (see *Thorpe v. Bestwick* (1881), 6 Q. B. D. 311); but this question was not in the circumstances necessary to be decided. On the other hand both the nuns as members of the community were potential, though indirect, beneficiaries, and it was argued that as they formed part of the community benefiting the trust must fail under section 15 of the Wills Act, 1837. Clauson, J., however, said (at p. 527): "I do not think it is a correct construction of the section to treat the fact that an attesting witness may, as a member of a community, get some benefit in some shape or form out of the administration of the fund, as amounting to a legacy or gift by the will to such individual member of the community." Carried to its logical conclusion this principle might perhaps be applied to attestation by a member of a class capable of benefiting under a discretionary trust, but it seems that its ambit must be limited to trusts which are in their nature charitable and do not, therefore, fail for uncertainty though the objects may be indefinite.

Vendor and purchaser—plan on conveyance.—The right of the purchaser to insist upon conveyance by plan has remained in some doubt: see "Williams' Vendor and Purchaser" (4th ed.), pp. 452, 453. A purchaser is entitled to insist upon proper identification of the land contracted to be sold both in the title deduced and in the conveyance executed: see "Williams' Vendor and Purchaser" (4th ed.), p. 451; but it has been held by Farwell, J., in *Re Sharman's Contract*, [1936] Ch. 755, that where the proposed

parcels in the conveyance clearly identify the property to be granted the purchaser cannot insist upon the addition of a plan. In *Re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741, Swinfen Eady, J., may have indicated that he thought that a plan could usually be insisted upon, but in the opinion of Farwell, J., he only intended to suggest that generally a plan is necessary for a sufficient and satisfactory identification. The learned Judge then laid down the principle that if there was a sufficient and satisfactory identification in the parcels without a plan it could only be provided at the expense of the purchaser. The description involved in the case was: "All that piece or parcel of land situate and being in the County Borough of Brighton bounded on the west by Norfolk Square, on the north by No. 28 Norfolk Square; on the east by No. 30 Norfolk Square, and on the south by No. 26 Norfolk Square, together with the messuage or dwelling-house erected thereon or on some part thereof and known as No. 27 Norfolk Square." The learned Judge held that the purchaser could not insist upon the vendor including a plan supplied by the purchaser because this would involve the vendor in the expense of verifying the accuracy of the plan. If the purchaser were prepared to meet the surveyor's expenses of verification it would appear that he could insist upon the plan, since it is for him to choose the method by which the conveyance is to be carried out: *Egmont v. Smith* (1877), 6 Ch. D. 469, at p. 474.

It may be convenient to point out here that these rules have no relation to conveyancing under the Land Registration Act, 1925. Where the contract is for the sale of the whole of the land comprised in a title the prescribed form of transfer requires no parcels describing the land, but the plan on the contract should be a copy of the plan on the land certificate. On the other hand, where the land sold is only part of that comprised in a title it is practically imperative to employ a plan on the transfer: see L. R. R. 281 (2); and consequently it is highly desirable that a plan should be attached to the contract for sale and that this plan should be based upon the plan contained in the land certificate. Failure to use the plan on the register as a basis for the contract sometimes leads to delay and inconvenience before completion.

Vendor and purchaser—alterations in a deed presumed to be made prior to execution.—Re Spollon and Long's Contract, [1936] Ch. 713 contains a warning against alterations made in a deed after execution. In this case the purchaser found on investigating the

title that a deed purporting to be in consideration of £75 12s. 6d. was only stamped 2s. 6d. The vendor's solicitors explained that the actual consideration was in fact £22 12s. 6d., though they were not able to explain when and for what purpose the alteration was made except that it had been made subsequently to execution. They offered a statutory declaration. Luxmoore, J., held that the purchaser was not bound, under an open contract, to accept the statutory declaration, since the alterations must be deemed to have been made prior to execution, and the learned Judge cited a passage from the judgment of Lord Campbell in *Doe d. Tatum v. Catemore* (1851), 16 Q. B., at p. 746, which concludes: "A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong."

The learned Judge also expressed his opinion (at pp. 718—719) that though a purchaser might be compelled in certain circumstances to accept a statutory declaration concerning certain facts, where the abstract supports the evidence of the declaration, or even accounting for the loss of title deeds and verifying the accuracy of the abstracted documents, yet a purchaser could not be compelled to accept a declaration contradicting the *prima facie* evidence of the abstract.

2. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., of Gray's Inn, Barrister-at-Law.

Distinction between lease and licence.—The question whether an agreement for the "front of the house rights" of a theatre can be construed as a lease, or is merely a licence, arose once more in *Clore v. Theatrical Properties, Ltd. and Westby & Co., Ltd.* (1936), 3 All E. R. 483.

Of previous cases on this subject the two best known are *Daly v. Edwardes* (1900), 83 L. T. 548, C. A., affirmed by the House of Lords *sub nom. Edwardes v. Barrington* (1901), 85 L. T. 650, H. L., and *Frank Warr & Co., Ltd. v. London County Council*, [1904] 1 K. B. 713. In *Daly v. Edwardes* the lessee of a theatre, by a document resembling a lease of land, granted to refreshment caterers the free and exclusive licence and right to use the refreshment rooms, bars and smoke rooms in the theatre. The word demise was not used, but there were covenants for quiet enjoyment, to pay rent, and not to assign without licence. Notwithstanding these technical expressions, which are more applicable to the grant of a lease than to the giving of a licence, it was held

that the document amounted only to a licence and not to a lease. In *Frank Warr & Co., Ltd. v. London County Council* the plaintiffs had an exclusive right for a term of years to supply refreshments in a theatre, and for that purpose were granted the use of certain rooms and other rights. The question was whether the plaintiffs had an interest in land which could be the subject of compensation under the Lands Clauses Consolidation Act, 1845, s. 68. It was held by the Court of Appeal that the agreement created a licence only and was not meant to create any interest in land. The principle underlying both these decisions was that in neither case was a right granted, by way of demise, to the *exclusive* possession of a part of the theatre.

In *Clore v. Theatrical Properties, Ltd. and Westby & Co., Ltd.* the indenture containing the agreement differed somewhat from the agreements in the earlier cases and lent itself rather more strongly to being construed as a lease. It provided that "the lessor doth hereby demise and grant unto the lessee the free and exclusive use of all the refreshment rooms . . . of the theatre . . . for the purpose only of the supply to and the accommodation of the visitors to the theatre and for no other purpose whatsoever". There was a condition against assignment or sub-letting without consent, and the terms lessor and lessee were defined to include their executors, administrators and assigns. Notwithstanding these clauses and the use throughout of language applicable to a demise, the Court of Appeal held that upon its true construction the indenture was not a lease but a licence merely. It was therefore a personal contract and could not be enforced by an assignee of the "lessee". It is clear from this decision that no matter how careful is the conveyancer, in drafting a contract of this kind, to make it resemble a lease by the use of clauses and expressions applicable to a demise, it will not take effect as a lease unless it clearly appears from the document that it is intended to vest in the lessee the right to the exclusive possession and control of a definite portion of the theatre. As this is not normally the intention and would scarcely be practicable in contracts of this kind, no amount of conveyancing skill can make what is in substance merely an agreement for a licence operate as a lease.

Measure of damages for breach of covenant.—In *Espir and Others v. Basil Street Hotel, Ltd.* (1936), 80 S. J. 894, the Court of Appeal reaffirmed the rule that the measure of damages for breach of a tenant's covenant is the amount by which the reversion

has been diminished in value. The plaintiffs were tenants of two floors in a building under a 98 years lease. They sub-let for the residue of the term less the last fifteen days, the sub-tenant covenanting not to alter the main walls, etc., without written consent. The sub-lease became vested in the defendants. In 1935 the freeholders granted the defendants a lease for 999 years of the whole of the building, subject to the plaintiffs' interest in the two floors. The defendants wished to adapt the whole of the premises as an hotel. Without the consent of the plaintiffs and in breach of their covenant they made substantial alterations in the premises which improved them regarded as an hotel, but it would have cost £450 to restore the work. The Court of Appeal held (citing Lord Esher, M.R., in *Witham v. Kershaw* (1885), 16 Q. B. D. 613) that the test for assessing damages was not how much would have to be spent to restore the premises to the same condition in which the tenant received them, but how much the reversion of the property had been diminished in value. Here the reversion would only last for fifteen days, unless the lease fell in earlier through bankruptcy, disclaimer, or failure to pay rent. The monetary value of such a reversion, where the defendants were entitled to possession both before and after the fifteen days, was such that it could not be said that the reversion had been diminished in value by the amount it would cost to restore the premises. There was no essential damage to the reversion, and only nominal damages could be recovered. This case should be contrasted with *Ebbetts v. Conquest*, [1895] 2 Ch. 377; [1896] A. C. 490, where the sub-lessor's reversion was similarly short but there was a real liability to the head-lessor to be taken into account in considering the sub-lessor's measure of damages against the sub-lessee.

Construction of clause in lease.—*Andreae v. Selfridge & Co., Ltd.* (1936), 2 All E. R. 1413, an action for damages for nuisance, raised a question of the construction of a clause in a lease reserving to the lessor a right to alter or rebuild adjacent property. Premises were demised to the plaintiff by a lease which contained the words, "subject nevertheless to all rights and easements appertaining to any of the adjacent property and to the alteration or rebuilding thereof without any claim by the lessee for compensation for injury upon such plans and elevations as Viscount Portman (the lessor) or his successors in title may determine".

In 1931 the defendants bought the residue of the plaintiff's term subject to the condition that the plaintiff was until Septem-

ber 29, 1936, to be the defendants' tenant upon the terms and conditions of the lease. In 1935 the defendants started to demolish near-by property with pneumatic hammers, and the Court found as a fact that there was an actionable nuisance by noise, dust and grit. The defendants took the point that by the terms of the provision set out above the plaintiff was obliged to put up with any injury that she might sustain by the rebuilding or alteration of adjacent property. Bennett, J., held that in the first place the property being demolished and rebuilt was not all adjacent property within the meaning of the clause, because at the time the lease was granted it would not have been possible to pass from the premises demised to the greater part of the property now being demolished without passing over the property of someone else. He held, moreover, that upon its true construction the clause meant that the demise was subject to all rights and easements which appertained to adjacent property of the lessor as it stood when the lease was granted, or which the adjacent property might have when the buildings upon it had been altered or rebuilt in accordance with the plans and elevations determined by the lessor or his successors in title. It had nothing to do with exonerating the lessor from responsibility for injury caused to his lessee by a nuisance which arose in the course of rebuilding or altering his property, and did not afford the defendants any answer to the claim for nuisance.

Construction of Law of Property Act, First Schedule, Part II, paragraph 3—meaning of “entitled to require”.—In *St. Germans (Earl of) v. Barker* (1936), 105 L. J. Ch. 219, a question arose as to the meaning of the words “entitled to require” in the Law of Property Act, 1925, First Schedule, Part II, paragraph 3. In 1857 the lessee of a term of eighty years demised the premises to a mortgagee for the residue of the term less three days. The assignees of the mortgage term took possession in 1896 and the equity of redemption was extinguished before January 1, 1926. At the end of the term the freeholder sued the assignees of the term for breach of the repairing covenant. It was contended for the freeholder that since the defendants were entitled, under section 89 (3) of the Law of Property Act, 1925, to declare by deed that the leasehold reversion affected by the mortgage and any mortgage term affected by the title so acquired should vest in them, therefore the defendants were persons entitled “to require any legal estate . . . to be conveyed to or otherwise vested” in them within paragraph 3 of Part II of the First Schedule. If this

were so, then such legal estate would vest in the defendants by virtue of that paragraph, and the defendants would be liable by privity of estate.

Crossman, J., however, rejected this argument, pointing out that to require a legal estate to be vested means require some other person to convey that legal estate. Paragraph 3 must therefore be construed to refer to the case where, by virtue of some estate or interest which the person has, he can call upon, or compel, some other person to do the act which conveys or vests the legal estate in the first person. In this case the defendants had no power to make a requisition requiring another to do the act; they had power to do the act themselves, and so the case did not come within paragraph 3. There was therefore no privity of estate to enable the freeholder to sue the defendants upon the repairing covenant.

It should be noted that in this case apparently there was no trust of the nominal reversion in the sub-demise as is customary in mortgages by sub-demise. If there is a trust of the nominal reversion then, provided the equity of redemption is gone, the sub-lessee would be liable: *Peachy v. Young*, [1929] 1 Ch. 449, distinguished in this case. Practitioners may, therefore, be reminded that when a client brings to their notice the existence of such an interest it is desirable that advantage should be taken of the amendment to Sch. I, Pt. II contained in the 1926 Act and a disclaimer of the term made, where possible.

Notice to quit part after severance of reversion.—Prior to the Conveyancing Act, 1881, the assignee of part of the reversion on a lease was only entitled to the benefit of conditions or powers of re-entry where the rent had been legally apportioned, which necessarily involved either consent by the tenant and recognition by him of the division of his tenancy or an apportionment action. This principle still applied until the Law of Property Act, 1925, to the giving of a notice to quit part of a holding where the ownership of the reversion had become severed. So in the case of *Re Bebington's Tenancy*, [1921] 1 Ch. 559, it was held that, the tenant not having recognised the division of his tenancy, a notice to quit given by the purchaser of one part was invalid *ab initio* and could not be cured by a subsequent notice to quit given by the purchaser of the other part, even although the second notice was given before the date from which a notice determining the entire tenancy had to run in order to be effective.

Section 140 of the Law of Property Act provided for the apportionment, upon the severance of the reversionary estate, of

every condition or right of re-entry, including a right to determine the lease by notice to quit or otherwise, and every other condition contained in the lease. Every such right and condition will remain annexed to the severed parts of the reversionary estate, and be in force with respect to the term whereon each severed part is reversionary, in like manner as if the land comprised in each severed part had alone originally been comprised in the lease. This enactment was accepted generally as enabling the assignee of part of the reversion to serve a valid notice to quit in respect of that part of the land wherein the reversionary estate was vested in him, whether or not there had been a legal apportionment of the rent, so overruling the law laid down in *Re Bebbington's Tenancy*. See, for instance, the 23rd edition of Woodfall at p. 318, and the 12th edition of Wolstenholme and Cherry at p. 473.

Smith v. Kinsey, [1936] W. N. 294, C.A.; 53 T. L. R. 45; 3 All E. R. 73, now provides judicial authority for this view. In that case a cottage and a garden plot were let together to the defendant. The plaintiff, who had purchased the reversionary estate in the garden plot but not in the cottage, gave notice to quit the garden plot and brought an action for possession. The County Court Judge held that it was a bad notice, apparently on the ground that there had been a severance of the reversion and that the owner of one part of the reversion so severed could not give a valid notice of re-entry. The Court of Appeal held, however, that section 140 of the Law of Property Act, 1925, altered the law laid down in *Re Bebbington's Tenancy*, and the effect of that section in the present case was to make the notice to quit a good notice. The view of the law stated in the text-books is therefore proved to be correct.

It is to be noted that by section 140 (2) a tenant who receives notice to quit from the owner of one severed part of the reversion "may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter notice expiring at the same time as the original notice". This provision has the curious result that where, in the case of a weekly tenancy, the owner of one part of the reversion gives a week's notice to quit, the tenant has one month in which to serve his counter notice, but the counter notice he serves must be one expiring at the same time as the original notice. How this result is to be achieved during the last three weeks of the month is not explained by the Act, yet it is clearly intended that the tenant shall in every case have one month in which to consider his decision. There is no requirement as to the actual *length* of notice needed for the tenant's counter notice.

3. INCOME TAX CASES.

By L. J. STEIN, Barrister-at-Law.

Annuity payable but unpaid.—The question of the taxpayer's liability in respect of income receivable but not received arose once more in *Woodhouse v. C. I. R.* (1936), 15 A. T. C. 202, which deserves notice as an application of the well-known decision in *Dewar v. C. I. R.*, [1935] 2 K. B. 351. In *Dewar's Case* the taxpayer had become entitled to claim interest on an unpaid legacy. The executors had ample funds available for paying the interest, but the taxpayer had refrained from demanding it, not waiving his claim but merely leaving it in suspense. On these facts it was held in the Court of Appeal that there had been neither an actual nor a constructive receipt of the interest, and that it could not, therefore, be treated as part of the taxpayer's total income. It is to be observed that, though the interest was the taxpayer's for the asking, he was entitled to it only on the footing that he elected to exercise his rights under the will. It was, however, open to him to disclaim the legacy and with it the interest. It would clearly have been anomalous to require him to include in his total income a sum representing interest which he had not in fact received on a legacy which he might elect not to accept.

In *Woodhouse's Case*, above, the facts were of a different order. The taxpayer had transferred certain property to a privately controlled company in consideration (*inter alia*) of a covenant by the company to pay him an annuity. The annuity had in fact been paid only in part. This was not because the company was unable to meet its obligations; it appeared from the Case stated that the evidence given by the appellant was that the sole reason for the balance of the annuity not being paid to him each year was that he did not require it. The taxpayer had only to demand payment and he could have had his annuity in full. Nevertheless, it was held by Lawrence, J., on the authority of *Dewar's Case*, above, that this was not sufficient to cause the whole amount of the annuity to form part of the taxpayer's total income; "the Commissioners have not found in this case that the annuity was paid to the appellant or that he received it or that he enjoyed it or that he exercised dominion over it". It does not appear necessarily to follow that the position would have been the same if the appellant had *waived* his right to the balance of the annuity, in which case it would seem that there might well have been considered to be a constructive receipt. But what had actually happened was merely that the appellant had chosen to let part of the annuity

remain unpaid. Where it is a question of the computation of profits, book-debts must, of course, be brought in in accordance with the ordinary rules of commercial accounting. But in the case of annuities and the like, *C. I. R. v. Woodhouse* appears to lay down the principle that the taxpayer cannot be required to include in his total income an amount in excess of what he has in fact received merely on the ground that if he had chosen to claim more he could have had it. Assuming that the balance has not been waived but merely not demanded, it is not clear to what year it would for tax purposes be considered to belong where it was subsequently demanded and paid in a case in which there was no question of the payer having defaulted.

Executors trading.—A decision of some interest to executors is that given by Lawrence, J., in *Marshall's Executors, Hood's Executors and Rogers v. Joly* (1936), 15 A. T. C. 157, the question being whether the executors of two deceased members of a trading partnership were to be considered to be carrying on a trade in partnership with the surviving member of the firm. The firm had consisted of three partners—M., H. and R., and it had been carrying on the trade of dealing in land. One of the partners, H., died in July, 1930. His executors called upon the surviving partners to realise the land remaining unsold and to pay them their appropriate share of the proceeds of the realisation. At the time of H.'s death part of the land owned by the partnership was being developed, and houses were being built upon it, by a company promoted by the partnership. H.'s executors agreed that, so far as this part of the land was concerned, the only practicable method of realisation was to allow the development to continue and the houses to be completed and sold. This was done, and by November, 1931, this part of the partnership property had been disposed of, and also all the land not in process of development, with the exception of one block. This one block still remained unsold when another of the partners, M., died in December, 1932, and it was not disposed of until October, 1933. On these facts it was contended on behalf of the Crown that after H.'s death a trade in land was being carried on by M., H.'s executors, and R. until M.'s death, and thereafter by M.'s executors, H.'s executors and R. This contention prevailed with the Commissioners, who took the view that the executors had in fact joined in carrying on a trade, and that it was not conclusive that neither H. nor M. had by his will given his executors authority to carry on a trade in land or any other trade.

Lawrence, J., held on appeal that there was no evidence to warrant this finding. He pointed out that it was not the case (as the Commissioners seem to have thought) that the executors had agreed to carry on the business as before. All they had done had been to agree that their right to receive their appropriate shares of the proceeds of realisation of the partnership assets should be postponed until it was practicable to realise those assets. The question of trading by executors sometimes presents difficulties, and the decision in this case may be instructively read together with that in *Cohan's Executors v. C. I. R.*, 12 T. C. 602, where it was held that the executors could not be considered to have been trading merely because they had elected to allow a profitable contract to be completed instead of arranging, as they could have done, for its cancellation.

Schedule A valuation.—Paragraph 1 of Part I of the First Schedule to the Finance Act, 1930, provides, with reference to the quinquennial determination of annual values outside the Administrative County of London, that the assessors shall bring in their certificates of assessments not later than July 20 in the preparatory year, with the proviso that in the case of assessments for the year of re-valuation 1931/32, the time-limit for bringing in the certificates of assessment shall be November 30, 1930.

The question which came before Lawrence, J., in *Kliman v. Stone* (1936), 15 A. T. C. 222, was whether the annual value must be determined by reference solely to the relevant facts as they existed at the date fixed by the Act as the latest date for the bringing in of the certificates of assessment, without regard to any facts arising after that date. On November 30, 1930, the property to which the appeal related (being property outside the Administrative County of London) was unoccupied. An assessment was made in April, 1932, in the sum of £56 net. This assessment was made in ignorance of the fact that in January, 1931, the property had been let on a full repairing lease at £160. Thereupon an additional assessment, under section 125 of the Income Tax Act, 1918, was made in the sum of £104 net. The additional assessment was appealed against on the ground that the lease was not in existence on November 30, 1930, being the statutory time-limit for the bringing in of certificates of assessment of annual value, and that no facts arising after that date could be taken into account for the purpose of determining the annual value for the year of re-valuation. If this contention were correct, it would, of course, be equally valid in relation to the time-limit of July 20 in the

preparatory year, which applies in the case of all re-valuations other than for the year of re-valuation 1931/32. Lawrence, J., rejected this view of the effect of the 1930 Act and held that the Commissioners could and should take account, not only of facts arising within the preparatory year, but also of facts arising within the year of re-valuation.

In *Kliman v. Stone*, the facts which, being discovered, led to the additional assessment, happened to be facts arising during the preparatory year, but in *Hills v. London Freehold and Leasehold Property Co.*, which was decided together with *Kliman v. Stone*, the discovery held to warrant an additional assessment was a discovery of facts arising in part during the year of re-valuation.

In the *London Freehold and Leasehold Co.'s Case*, the property was within the Administrative County of London and consequently within the application of sections 31 and 32 of the Finance Act, 1930. The effect of section 31 is that, as from the beginning of the year of assessment 1931/32, the Valuation (Metropolis) Act, 1869, shall cease to have effect in so far as it requires the valuation-list for the time being in force to be treated as *conclusive* evidence of annual values for income tax purposes. Section 32 (1), however, provides that if a new valuation-list has been finally approved by the Assessment Committee of any assessment even in London, the returns made for the purposes of the valuation shall be transmitted to the surveyor of taxes, and if any such return contains all particulars necessary for the determination of the annual value for income tax purposes, "it shall be deemed to be a statement of the annual value thereof made for the purposes of assessment under Schedules A and B".

In the *London Freehold and Leasehold Co.'s Case*, the occupier had in January, 1930, made a correct return in accordance with the Valuation (Metropolis) Act, 1869. A Schedule A assessment was made in August, 1931, in ignorance of the fact that in August, 1930, the rent of the premises on a temporary extension of the lease had been substantially raised, and that in April, 1931, the premises had been let to another lessee at a rental much higher than that reserved by the lease in force when the occupier made his return in January, 1930. On these facts being discovered, additional assessments were made in 1934, under section 125 of the Income Tax Act, 1918, for the year of assessment 1931/32 and the succeeding years. It was held by Lawrence, J., that because in January, 1930, a return which was correct at the time it was made had been made by the occupier under the Act of 1869, it did not follow that the Commissioners were precluded from taking into account facts arising after that date. Just as in the case of

property outside London a line is not to be drawn at the date fixed for the bringing in of certificates of assessments during the preparatory year (*Kliman v. Stone*, above), so in the case of property within the metropolitan area a line is not to be drawn at the date of the return made by the occupier under the Act of 1869, even if that return, when made, was correct. Relevant facts arising at any time either within the preparatory year or the year of re-valuation may, when discovered, be taken into account as a basis for additional assessments.

Valuation by a person of skill (I. T. A., 1918, s. 138).—Section 138 (1) of the Income Tax Act, 1918, provides that where the annual value of property for the purposes of a Schedule A assessment is in dispute, the Appeal Commissioners may, in their discretion, and must, if required by the appellant, cause a valuation to be made by “a person of skill”. The sub-section goes on to say that “the annual value shall be determined in accordance with that valuation”. *Lyons v. Collins* (1936), 15 A. T. C. 256 rounds off the decision of the Court of Appeal on section 138 (1) in *Stewart v. Lyons* (1934), 19 T. C. 79. In that case it appeared that the “person of skill” had made his valuation without reference to the principles laid down in the Income Tax Act with regard to the determination of annual value for the purposes of Schedule A; his valuation was of the nature of a valuation at large. It was held by the Court of Appeal that the Commissioners were not bound by the valuation, since it was not, within the meaning of section 138 (1), a valuation at all. The case having been remitted to the Commissioners for them to ascertain the annual value, the appellant again called for a valuation by a person of skill. A valuer was duly appointed and, in reporting his valuation, expressly stated that it was an estimate of the annual value in accordance with the Rules of Schedule A. The question which came before Lawrence, J., was whether the Commissioners were bound by the valuation. It was held that they were; where a valuation has been made under section 138, it is binding upon the Commissioners if it is not bad on the face of it and there is no question of dishonesty or fraud.

CONVEYANCER'S NOTEBOOK.

Practical forms.—It is hoped to adopt the policy of incorporating in the precedents a number of forms, preferably short, affecting matters arising in general practice, but not readily to be found in the precedent books. The Editors invite the co-operation of readers, and will welcome suggestions of any matters of this character which have afforded difficulty. Readers who have had occasion to draft forms to meet this need are invited to submit them, with any appropriate notes, for publication, for which the usual remuneration will be paid.

Advantages of registration of title.—The contents of the Land Registry pamphlet on this subject were set out shortly in the last number at p. 96, *ante*. It is proposed to deal here with some of the claims put forward in the pamphlet.

It is difficult in a short form of propaganda to avoid statements which may convey, to the uninitiated, erroneous conceptions, and it is the duty of the profession to acquaint itself with these claims and to consider their foundation. It is not possible in a note to consider exhaustively all the claims made but here one or two major points may be made. The subject is worthy of a long article and it is hoped that this it may receive in some later issue.

Fundamentally the value of registration lies in the pecuniary indemnity of any *purchaser* and the value of the system can be seen in the small claims made against the indemnity fund, though this may reflect also on the scarcity of bad titles in the country as a whole. However, to translate this into an advantage to the *first* registered proprietor (at p. 8) that “he obtains forthwith a State-Guaranteed security of title” seems a little disingenuous in the light of *Chowood v. Lyall*, [1930] 2 Ch. 156, where the first registered proprietor was held not entitled to any indemnity in respect of rectification of the register in favour of an adverse possessor whose title antedated the purchase by the registered proprietor. The guarantee appears to be in favour only of a purchaser from the first proprietor and furthermore it is an indemnity and not a guaranteed title to the land; a fact which cannot be too strongly

stressed where sometimes land has a value other than its price. The further statement (on the same page) that registration adds to the saleability of the land and consequently increases its value and adds to its price hardly seems warranted by experience since a purchaser rarely knows or cares whether the property is registered when he agrees the price.

The second common claim for registration is its comparative cheapness with regard to disposition. There are some very interesting and valuable comparative tables of costs which show that a first proprietor can recover more than his cost of first registration on sale of the land, though it is suspected that the fee allowed to solicitors by the table is barely all to which they would be strictly entitled under the Solicitors' Remuneration Act in many cases. To this point there are two angles which are worthy of consideration. The first is that this comparison omits the expenses thrown upon a registered proprietor in connection with dispositions made otherwise than for value. For example, where a settlement is made all the ordinary costs will be involved and there will be additional costs involved in registering the appropriate instruments to give effect to the settlement and any change of trustees or other relevant transactions. Similarly all costs in connection with leases requiring registration will be enhanced, and though these usually fall upon the lessee this aspect of the matter does not increase the popularity of registration. In point of fact this whole claim is based on the erroneous conception that the primary purpose of landowning is to buy and sell land as a commodity, whereas sale actually plays a very small part in its enjoyment.

The second angle is one in which the profession is vitally interested and which has barely received adequate attention. The claim is so constantly made that solicitors are saved much labour by registration and that the scale provided is at least as remunerative as in the case of unregistered land (see p. 6) that it is peculiar that no protest has been made. Granted some simplification in the investigation of title, the responsibility in drawing or perusing the contract for sale is very little affected and in practice to-day this is generally the most onerous part of the transaction from the point of view of the solicitor (a), while the printed forms do not relieve the practitioner to any large extent since all the more intricate questions such as easements, restrictive covenants and similar

(a) "There is no necessity for a contract affecting title" (p. 4) is perhaps the most misleading of the generalisations appearing in the pamphlet. In the simplest cases there is no necessity in unregistered conveyancing and in any other case it is equally necessary in registered conveyancing; the term "title" is here used in too restricted a sense to be a safe guide.

obligations require exactly the same attention in the one case as in the other apart from the non-operation of the Land Charges Act, 1925. The writer has long been surprised that practitioners, in the light of their experience, have made no representations to the Law Society concerning the scale. But what after all goes to the root of the matter is this claim to simplicity of investigation. It is possible, here, to make only three points.

The first affects the statement concerning "a scientific plan identifying the land" (see p. 8). Regarding the general identity of the land there is usually no doubt, but concerning boundaries there frequently is. The "scientific plan", however, rarely defines the boundaries save in the case where no difficulty would be likely to arise in unregistered conveyancing. If the plan does not define the boundaries the Registry is generally unable to assist the proprietor.

Secondly, the claim that registration with absolute title "eliminates examination of title in all cases" assumes that there are no overriding interests, which must be the subject of ordinary investigation, and that the study of the Land Certificate and the interests noted on the register do not require an equal degree of technical skill, which in fact they do. Furthermore, the claim that the practitioner is saved much time in investigation is largely illusory where a personal search is made, owing to the inevitable delays in inspecting the relevant documents in different parts of the Registry. And thirdly, perhaps, the greatest complaint that can be made is the dual assumption that personal search is unnecessary and that a purchaser is protected from fraud "by duplication or suppression of deeds". A Land Certificate is only evidence of the contents of the Register, and can be altered, it is thought, without difficulty; that registered land shares this weakness with unregistered land is shown by prosecutions for fraudulent alteration of Land Certificates. A purchaser relying on an altered Land Certificate is not protected, and a personal search is therefore necessary to avoid this possibility.

Let the writer add that he thinks registered conveyancing inevitable, and his hope is that the profession may represent that there is room for improvement.

Air Navigation Act, 1936—acquisition of land for aerodromes and protection against obstruction.—The Air Navigation Act, 1920, s. 8, provided that a local authority, subject to the consent of and the conditions prescribed by the then supervisory authority,

the Air Council, was to have the power to establish and to maintain aerodromes, and to acquire land by agreement for these purposes by purchase or hire, either within or without its area; and the appropriate provisions of the Lands Clauses Acts were accordingly to apply. The local authorities thus empowered to act were the Common Council of the City of London, the councils of counties and county boroughs, and urban district councils. There was no power, however, then given to acquire land compulsorily for those purposes. This defect was, perhaps, partly remedied by the Local Government Act, 1933, s. 159, by which a county council was authorised to purchase compulsorily any land, whether within or without the borders of the county, for the purpose of its functions under any public general Act. It is debatable, however, whether the establishment of an aerodrome would have been within the "functions" of a county council; though in the previous Local Government Act, 1929, s. 134, "functions" were defined to include the powers and duties of the local authority.

By the Air Navigation Act, 1936, in addition to their previous powers, land may now, by virtue of section 9 of this Act, be compulsorily acquired by local authorities for the same purposes in regard to the establishment and maintenance of aerodromes as it could have been acquired by agreement. At the same time other lesser changes in the law were made and attention is directed to these.

In the first place the Act of 1936, s. 8, extended the definition of local authority to include metropolitan borough councils. Then, the Secretary of State for Air became the controlling authority in the place of the Air Council; and it is his assent which the local authority must seek in making a compulsory purchase order for the acquisition of land for an aerodrome, because the order is to be confirmed by him before it can come into operation. The Act in this respect, in its First Schedule, has followed the procedure provided by the Town and Country Planning Act, 1932, in relation to the proper form of notices and the assessment of compensation.

With the power to establish aerodromes is coupled the right to provide and maintain in connection with them roads and approaches and accommodation in the nature of apparatus, equipment and buildings: Air Navigation Act, 1920, s. 8 (1), as amended. In connection with this, and for the avoidance of doubt, it is declared that one of the purposes for which a local authority may acquire land is to secure that the land adjacent to the site of the aerodrome will not be used in such a manner as to interfere with or cause danger or damage to aircraft at, approaching, or leaving the aerodrome: *ibid.*, s. 8 (2). This power to establish a buffer area,

as it may be described, obviously enables an important addition to be made to the amenities of an airport; and when once the land is acquired to form this area the authority is not precluded from advantageously dealing with it afterwards, because, by a further statutory provision (Air Navigation Act, 1936, s. 10 (2)), the local authority is given power to sell the land forming the buffer area, subject to the consent of the Minister of Health, with such restrictions on its user as to prevent it becoming a danger to aircraft using the particular aerodrome. In this way the dangers which would arise from aerial obstruction near an airport can be effectively eliminated.

This question of aerial obstructions raises new problems. Comprehensive powers are given to the Secretary of State for Air if he is satisfied that any building, structure, or erection in the vicinity of an aerodrome is a danger to aircraft in darkness or in conditions of poor visibility: Air Navigation Act, 1936, s. 14. He may then make an order authorising the proprietor of the aerodrome to execute works, or instal apparatus on the obstruction, so as to give adequate warning to aircraft approaching or leaving the aerodrome. Adequate safeguards are provided by the section to protect the proprietary rights of those interested in the land on which any obstruction is situated and in the matter of compensation for interference. But what may also engage the attention of local authorities, from the other standpoint, is that provisions are made to meet the special position of statutory undertakers. Aerial obstructions most commonly consist of bulky or prominent objects of industrial property, such as gas containers and overhead cables; and it is very desirable that when near aerodromes the presence of these and similar objects should be very clearly indicated. The nature of the obstructions which the statute had in view is plainly indicated by the definition of statutory undertakers as meaning any person authorised by any enactment, or statutory order, to construct, work or carry on any railway, canal, inland navigation, dock, harbour, tramway, gas, electricity, water, or other public undertaking of a like kind: Air Navigation Act, 1936, s. 34 (1). With regard to any obstruction in which these statutory bodies are interested any Order made by the Secretary of State is to be so framed as to avoid interfering with the proper carrying on of the undertaking; and entry on the premises of the undertakers is only to be made after special notice and under the reasonable directions of the undertakers: *ibid.*, s. 14 (7). Where it becomes necessary to take special measures the expenses of the undertakers are to be met by the proprietor of the aerodrome: *ibid.*

The protection of aircraft navigating in bad conditions of flying will be further assisted if the recommendation in the recent report of the Committee on common form clauses in private bills is carried out. It is there suggested that, where clauses are inserted in a private bill enabling a local authority to require the raising of the height of chimneys, the Secretary of State for Air must be given a voice when the chimney affected is within one mile from an aerodrome.

Additional safeguards against personal injury have been secured to the ground population in the matter of trespassing at aerodromes. A penalty, not to exceed five pounds on summary conviction, is imposed on trespassers, provided that adequate notices are posted in prominent places on or near the boundaries of the aerodrome warning persons of this liability: Air Navigation Act, 1936, s. 13.

The general power which a local authority enjoys of dealing with its land is limited to the extent that where land, which has been acquired by a local authority for the purpose of establishing an airport, is intended to be appropriated for any other purpose this can only be done with the consent of the Secretary of State (*ibid.*, s. 10 (1)); and, in the matter of interference, a local authority is not to create any works interfering with tidal lands below high-water mark of ordinary spring tides, except in accordance with plans and sections approved in writing by the Board of Trade, and subject to the conditions imposed: Air Navigation Acts, 1920 and 1936, s. 8 (6).

N. H. MOLLER.

THE LIBRARY.

A TREATISE ON THE LAW OF INCOME TAX. By JUDGE KONSTAM, K.C. Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. London. 1936. £2 2s. net.

Konstam on Income Tax is far too well known a work to require any introduction to readers of *The Conveyancer* or any commendation from a reviewer. There are other excellent guides through the mazes of the Income Tax Acts, but none which meets exactly the same need. Books on Income Tax fall into several distinct categories. Dowell's monumental work is the supreme example of one type—the text with annotations. Then come the works designed primarily to explain the actual working of the

Income Tax code in its practical application. Again, there is a useful group of works dealing comprehensively with some particular branch of Income Tax law. Each type has its uses; the student of tax problems needs all the guidance he can get. But Konstam on Income Tax performs an important task which has nowhere else been attempted on similar lines and on a comparable scale. Over and above everything else that has been written about Income Tax, it is essential that it should be possible to find somewhere a systematic exposition of the provisions of the Income Tax Acts as a whole, grouped by subjects, and reduced to some semblance of order and coherence. It is the outstanding merit of Konstam on Income Tax that it represents the application of a distinguished legal mind to this laborious but most necessary enterprise.

The seventh edition, which has just appeared, incorporates references to legislation and decisions up to the end of the last legal year. Most readers will turn first to the discussion of the new Finance Act, of which the author observes that "for intricacy—to use no harsher word—these enactments can hardly be equalled, even in the Income Tax Acts." He adds modestly: "I have tried to state their effect." Those who are doomed to struggle with the forbidding provisions of sections 18 to 21 will be grateful for the light that is thrown upon them. Bristling as they are with debateable points, they are not, of course, analysed in minute detail. There does not appear, for example, to be any discussion of the obscure and ambiguous expression "dealt with" in sections 18 and 21, nor of the difficult words "control of the company's affairs" in section 19. But no reasonable reader will look for an exhaustive commentary on a new Act still awaiting judicial interpretation. What he will find, and will gratefully welcome, is a clear account—so far as clarity is possible in dealing with such subject-matter—of the provisions of the new Act, with some illuminating comments on certain selected points; indeed, the author performs the remarkable feat of making sections 18 to 21 appear almost comprehensible. And now one small complaint. Why does the Table of Cases so often omit references to Tax Cases Reports, which would, for some practitioners at least, be more useful than any other references? To take three examples at random, *Drummond v. Collins*, *Erichsen v. Last*, and *Goslings and Sharpe v. Blake*, are all reported in Tax Cases, but in each instance the Tax Cases reference is omitted. This is a trifling matter, but it can so easily be remedied that it seems just worth mentioning.

THE TITHE ACT, 1936, AND THE RULES THEREUNDER. By R. WYNNE FRAZIER, of Gray's Inn and the Midland Circuit, Barrister-at-Law. The Solicitors' Law Stationery Society. London: 22 Chancery Lane, W.C.2. 1936. pp. xvi + 204. 12s. 6d. net.

After a very short but readable Introduction on the problem of tithe and the solution proffered by the 1936 Act this work gives the text of the Act with notes. These notes include references to the numerous other statutes dealing with this complicated subject and explain the changes made by the new Act. They also offer explanations of many of the terms employed by the Act which can only be construed in the light of the existing law. There are several appendices which contain the Rules and Orders published at the time of going to press (October, 1936), though it is believed there are others yet to come; a digest of recent cases decided on tithe, though these relate primarily to the old law; and a digest of some of the provisions contained in the older Acts. Altogether it makes a handy reference book to this new and inevitably complicated piece of legislation, with what appears to be an adequate index. It may be added that the notes appear to be more helpful than is sometimes the case in books of this kind.

THE HOUSING ACT, 1936. By the Hon. DOUGALL MESTON, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1936. pp. lii + 230. £1 1s. net.

The Housing Act, 1936, is a consolidating enactment, and for those who have occasion to deal with this problem, and that includes very many practitioners, it is convenient to have a properly indexed and annotated copy to which to refer. As is usual in this class of legislation, that the provisions frequently can only be understood properly in the light of a number of sections which are not necessarily to be found in the same part of the statute. This need and the relation between the provisions of the Act is fully met in the annotations, which also include references to the cases decided on the relevant matters with which the Act deals. The book also contains an Introduction of thirty-seven pages which summarises the Act and enables a practitioner to obtain a clear view in perspective of its purpose and scope; since the Act contains 191 sections and twelve Schedules this is invaluable to the busy practitioner.